

No. 12441

United States
Court of Appeals
for the Ninth Circuit.

HUGO V. LOEWI, INC., a corporation,

Appellant,

VS.

KILIAN W. SMITH,

Appellee.

Transcript of Record

Appeal from the United States District Court,
for the District of Oregon.

FILED

MAR 9 - 1950

PAUL P. O'BRIEN,
CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the Circuit Court of the State of Oregon
for the County of Marion

No. 34864

KILIAN W. SMITH,

Plaintiff,

vs.

HUGO V. LOEWI, INC., a corporation,

Defendant.

COMPLAINT

Plaintiff complains of defendant and for his First cause of action alleges:

I.

At all times herein mentioned plaintiff operated a farm known as "the old Novvak farm" located about 2½ miles northwest of Donald on the Aurora-Newberg Highway in Marion County, Oregon. During the 1947 season, about 10 acres of said farm were planted in Cluster hops, and about 24 acres were planted in Fuggle hops.

II.

At all times herein mentioned defendant was, and now is, a corporation incorporated under the laws of the State of New York, with its home office located at 33 Water Street, New York City, New York. Defendant has never qualified under the laws of Oregon to carry on business in Oregon as a foreign corporation.

III.

Defendant's business consists mainly in buying and selling hops. During all the times herein mentioned defendant was and is transacting such business in Oregon. Each of plaintiff's causes of action herein alleged arose in Marion County, Oregon. None of the officers of defendant resides or has an office in said county. Defendant's principal agent in Oregon was, and is, C. W. Paulus who resides and has his place of business in Salem, Marion County, Oregon.

IV.

On or about August 19, 1947, defendant inspected plaintiff's said Cluster hops growing on said farm. Thereafter, on said date, defendant entered into a contract in writing with plaintiff whereby plaintiff agreed to sell, and defendant agreed to buy, said entire crop of said Cluster hops grown on said farm during 1947. Said contract contained the terms and conditions as set out in "Exhibit A" attached hereto and hereby made a part hereof.

V.

Plaintiff duly performed all of the terms and conditions of said contract on his part to be performed except to the extent that such performance was waived by defendant, or prevented by its acts or conduct as herein alleged. Plaintiff duly completed the cultivation, harvesting, drying, curing and baling of all of said Cluster hops grown on said farm during 1947, in accordance with said

contract. Pursuant to said contract, defendant advanced to plaintiff \$3,000.00 to apply on the purchase of said Cluster hops.

VI.

On or about August 26, 1947, while plaintiff was picking said Cluster hops, defendant again inspected them. Any defect which said hops may have had by reason of blight was apparent to defendant at the time of said inspection. Defendant instructed plaintiff to continue picking said hops under said contract, and plaintiff did so in reliance on defendant's said instruction.

VII.

On or about September 15, 1947, after said Cluster hops had been picked, dried, cured and baled as aforesaid, plaintiff, with the assent of defendant, delivered at the Oregon Electric Company warehouse at Salem, Oregon, all of said Cluster hops and set same aside for defendant. Thereupon, defendant sampled and weighed in said hops.

VIII.

Said Cluster hops so weighed in by defendant consisted of 73 bales, and had a total net weight, as determined by defendant, of 14,112 pounds. Pursuant to said contract on or about September 18, 1947, plaintiff selected as the sale price for said Cluster hops the grower's market price at that time, and notified defendant in writing thereof. The sales price for said Cluster hops, so determined as pro-

vided by said contract, was 85 cents per pound. Said contract provided, however, that if the leaf and stem content was from 8% to 10% then said price would be reduced 1 cent per pound for each 1% increase in said leaf and stem content over 8%. The contract provided for the determination of said leaf and stem content by an authorized governmental agency. Pursuant to said contract said 73 bales of said Cluster hops so set aside for, and weighed in by defendant at said warehouse were inspected by the United States Department of Agriculture and found to have a leaf and stem content of 9%. The contract sales price for said Cluster hops was accordingly 84 cents per pound.

IX.

Thereafter general market prices of Cluster hops began a downward trend and continued to decline until they reached a level of about one-half of said contract price of 84 cents per pound. While said market prices were so declining, on or about October 16, 1947, defendant refused to pay for plaintiff's said Cluster hops on the stated grounds that they were dirty picked and badly blighted, and on no other specific ground. Said Cluster hops were not dirty picked in that the leaf and stem content determined by the inspection of the governmental agency pursuant to said contract, as aforesaid, was less than the 10% tolerance allowed by said contract. Said hops were not any more badly blighted than when defendant inspected and contracted to buy the same, or than when defendant subsequently in-

spected them and instructed plaintiff to continue picking the same. Plaintiff believes and therefore alleges that the actual reason for defendant's refusal to pay the balance due on said purchase of said Cluster hops was the general market condition described above, and that defendant would have persisted in said refusal regardless of anything more plaintiff might have done or offered to do.

X.

At all times since defendant so declined to accept said Cluster hops, they could not be re-sold for a reasonable price for the reasons that

(a) defendant's said contract of purchase purported to constitute a lien on said hops and a cloud on plaintiff's title thereto,

(b) there was an over production of hops during the 1947 season in that the amount produced was substantially in excess of the market demand, and

(c) it is not the practice of any of the hop buyers doing business in this territory to buy hops which have been rejected by another hop buyer unless the seller will waive any right of action he may have against the buyer who rejected such hops.

Therefore, plaintiff has at all times held said Cluster hops as bailee of the defendant, and so notified the defendant, and said hops are still in said warehouse subject to the disposal of the defendant upon paying the balance of the contract price due to the plaintiff.

XI.

By reason of the facts stated above defendant became indebted to plaintiff in the sum of \$11,854.08 for said Cluster hops. Of that amount defendant has paid the sum of \$3,000.00 (being the advances mentioned in paragraph V), and there is still due and unpaid the sum of \$8,854.08, with interest thereon at the rate of 6% per annum from October 25, 1947, until paid.

XII.

On several occasions after said amount of \$8,854.08 became due, plaintiff duly made demand on the defendant for payment thereof but each such demand was refused by defendant on the grounds stated in paragraph IX above, and on no other specific ground.

Plaintiff complains of defendant and for his second cause of action alleges:

I.

Alleges each and all of the allegations, things and matters contained in paragraphs I, II and III of plaintiff's first cause of action above, and incorporates the same herein by this reference.

II.

On or about August 19, 1947, defendant inspected plaintiff's said Fuggle hops growing on said farm. Thereupon defendant entered into a contract in writing with plaintiff whereby plaintiff agreed to sell, and defendant agreed to buy, the entire surplus crop of said Fuggle hops "over existing contract"

grown on said farm during 1947. By the reference in said contract to the entire surplus crop of said Fuggle hops "over existing contract" was meant all of said Fuggle hops grown on said farm during 1947 remaining after the portion of said hops which plaintiff had previously agreed to sell to a third party. Said contract with defendant contained the terms and conditions as set out in "Exhibit B" attached hereto and hereby made a part hereof.

III.

Plaintiff duly performed all of the terms and conditions of said contract for said Fuggle hops on his part to be performed. Plaintiff duly completed the cultivation, harvesting, drying, curing and baling of all said Fuggle hops grown on said farm during 1947 in accordance with said contract. Pursuant to said contract, defendant advanced to plaintiff \$3,500.00 to apply on the purchase of said Fuggle hops.

IV.

After said Fuggle hops had been picked, dried, cured and baled, as aforesaid, plaintiff with the assent of defendant delivered at the Oregon Electric Company warehouse at Salem, Oregon, all of said Fuggle hops and set defendant's portion aside for it. Thereupon, defendant sampled, weighed in and received its portion of said hops.

V.

Said Fuggle hops so weighed in and received by

defendant consisted of 59 bales and had a total net weight, as determined by defendant, of 10,986 pounds. Defendant accepted the same at the price of 91 cents per pound, and subsequently shipped them out.

VI.

By reason of the facts hereinabove alleged defendant became indebted to plaintiff in the sum of \$9,997.26 for said Fuggle hops. Of that amount \$3,500.00 has been paid (being the advance mentioned in paragraph III), and there is still due and unpaid the sum of \$6,497.26, with interest thereon at the rate of 6% per annum from October 25, 1947, until paid.

VII.

On several occasions after the full balance of \$6,497.26 for the sale of said Fuggle hops became due plaintiff duly made demand on defendant for the payment thereof, but each such demand was refused by defendant.

Wherefore, plaintiff demands judgment against the defendant for the sum of \$15,351.38, with interest thereon from October 25, 1947, until paid, and for plaintiff's costs and disbursements in this action.

/s/ ROY F. SHIELDS,

/s/ WILLIAM E. DOUGHERTY,
MAGUIRE, SHIELDS,

MORRISON & BAILEY,
Attorneys for Plaintiff.

EXHIBIT A.

(Copy)

This Agreement, Made this nineteenth day of August, 1947, between Killian Smith of Route 1, Aurora, Oregon, hereinafter called the seller, and Hugo V. Loewi, Inc., of 33 Water Street, New York City, N. Y., hereinafter called the buyer, Witnesseth:

First—In consideration of one dollar (\$1.00) paid to the seller by the buyer, at the time of signing this instrument, the receipt whereof is hereby acknowledged, and of the agreements hereinafter contained on the part of the buyer, the seller agrees to cultivate and complete the cultivation of about 10 acres of land now planted in hops, during the year 1947, consisting of 10 acres planted in cluster hops, and on the following described real estate, to-wit: situate about 2½ miles northwest of Donald on the Aurora-Newberg highway on what is known as the old Novvak farm in Marion County, State of Oregon, and to harvest, cure and bale the hops grown thereon in said year 1947 in a careful and husbandmanlike manner, and the seller does hereby bargain and sell, and upon ten days' notice in writing therefor, agrees to deliver and to cause to be delivered to the buyer, not later than the 31st day of October of said year f.o.b. cars or in warehouse at Salem, Oregon, free from all liens and encumbrances of any kind and nature entire crop estimated at—ten—thousand pounds (10,000 lbs.) of cluster hops grown on said premises, and in bales weighing not less than 185 pounds and not more than 210 pounds each, in

new 24 ounce baling cloth (5 pounds tare per bale to be allowed) ; that such hops shall not be the product of the first year's planting, and not affected by spraying or mold, but shall be of prime quality, in sound condition, good color, fully matured, cleanly picked, free from damage by vermin, properly dried, cured and baled, and in good order and condition. The buyer under and by this contract shall have the preference of selection, both as to quantity and quality over all other persons who may hereafter make contracts in relation to hops produced from said farm, and said buyer, for the purpose of examining and inspecting the same, may, at any time, and until the full performance of this agreement, have free access to the above described premises, or any other premises where said hops may be.

The price to be paid for the hops to be delivered shall be the Grower's market price for the kind and quality of hops delivered containing eight (8%) per cent of leaves and stems and six (6%) per cent, or more, of seeds; the said Grower's market price may be selected by the seller on any day between August 19, 1947, and October 31, 1947, both dates inclusive, and the Seller must notify the Buyer in writing of his selection on the day he selects. If the Seller does not select and notify then the Grower's market price of October 31, 1947 shall constitute the price for such hops, however, the Buyer agrees that the minimum price for the kind and quality of hops described herein and to be delivered under the terms of this contract shall be Eighty-one (81c) cents per pound.

It is further understood and agreed that in the event the leaf and stem content be less than eight (8%) per cent, then the minimum price, or the market price as selected and agreed upon, will be increased one (1c) cent per pound for each one (1%) per cent reduction in leaf and stem content below eight (8%) per cent; and in the event the leaf and stem content exceeds eight (8%) per cent, then the minimum price, or the market price as selected and agreed upon, will be reduced one (1c) cent per pound for each one (1%) per cent increase of leaf and stem content to and including ten (10%) per cent.

The determination of the leaf and stem content, as aforesaid, shall be on the basis of an analysis made by the Oregon State Department of Agriculture, or by an authorized governmental agency.

Second—The buyer does hereby purchase the above described quantity of said hops and agrees to pay therefor by check, draft, or in lawful money of the United States of America, on the delivery thereof and acceptance by the buyer, and within the time and conditions herein provided, the price or prices as aforestated for each pound thereof which shall be delivered to and accepted by the buyer, who is to have the right to inspect the same before acceptance, and to accept any part less than the whole of the hops so bargained for, should for any cause the quantity of hops of the quality, character and kind above described, and which shall have been raised, picked and harvested from said premises and

tendered for acceptance be less than the amount herein bargained and sold; and upon the said buyer giving said notice to deliver as herein fixed tendering to the seller the full amount of the purchase price thereof in lawful money, after deducting any advances made and interest thereon, the title and ownership and the right to the immediate possession of the said hops shall at once vest and be in the said buyer. In order to enable the seller to produce and harvest said crop and put the same in the condition herein agreed, the buyer will advance and loan to the seller such sums of money as may be required by the seller to defray the necessary expenses of cultivating and picking such hops, and of harvesting and curing the same and for such purposes only, not to exceed, however, twenty-five (25c) cents for each pound of hops herein bargained and sold and which may be grown on said lands, such advances to bear interest at the rate of no per cent per annum. Said advances to be paid in the following manner:

25 cents per pound or \$2,500.00 on or about September 1, 1947;

provided, such sums are actually required for the cultivation, picking, drying and baling of said hops, and that, if before, at, or during the time of picking such hops, they are not in such condition so as to produce the quality of hops called for under the terms of his agreement, then in such event, the buyer shall be discharged from any obligation to make any advances or further advances, and from the obligation to receive the whole or part of said

hops; and that this instrument shall then stand and be in force as a chattel mortgage upon the whole of said hop crop for any advances which shall have been made, or may be made, and interest thereon.

Third—The said parties hereto further agree that as soon as the picking of the said hops is commenced the seller shall insure his hop houses on said premises and the entire crop of hops growing thereon against damage by fire for the full market value thereof and until the delivery under this contract, such insurance to be placed in only good solvent fire insurance companies. The policy thereon shall provide that the loss, if any, shall be paid to the buyer; but if the seller fails to procure such insurance or to pay for the same, the buyer shall have the right to procure such insurance in his own name, or in that of the seller at the buyer's option at any time after commencement of picking. The seller agrees to repay to the buyer at the time of delivery all premiums on such insurance with interest at the rate of 6 per cent per annum.

Fourth—All sums of money to be advanced under the terms of this contract are payable only at the office of the buyer in Salem, Oregon, upon ten days' written request and notice by the seller to the buyer therefor; such money may be forwarded either in cash or by check or draft by mail, or express, at the seller's risk and expense. It is further agreed between the parties hereto that the times when the said moneys shall be advanced, and when the said hops shall be delivered pursuant to

this contract, are of the essence of this contract, and that failure upon the part of the buyer to advance said money at said time, the seller not then being in default, shall give the seller the right to rescind the contract at his option, and the failure upon the part of the seller to deliver the hops within the time and in the condition and of the quality provided for by this contract, the buyer not then being in default, shall give the buyer the right to rescind the contract at his option.

Fifth—The parties hereto further agree that upon the breach of the terms of this contract by either party, the difference between the contract price of said hops and the market value thereof at the time and place of delivery shall be considered and is hereby agreed to be the measure of damages, which may be recovered by the party not in default for such breach, and the said difference between the said contract price and the market value thereof is hereby agreed and fixed and determined as liquidated damages.

Sixth—That for and in consideration of the said 25 cents per pound, not exceeding in all the sum of two thousand five hundred and no/100 Dollars, hereinbefore agreed to be advanced by the buyer, and in consideration of the faithful performance of the said contract by the seller and for the payment of said liquidated damages, the seller does hereby bargain, sell, transfer, set over and mortgage unto the said buyer, the entire crop of hops growing and raised upon the premises above de-

scribed in the year 1947, to secure unto the said buyer the repayment of said advances and interest and the said liquidated damages upon the demand of said buyer, or in case the said seller shall part with the possession of any of said hops, or remove or undertake to remove any thereof, out of said Marion County, or suffer the same to be attached or levied upon by any creditor of said seller, or should bankruptcy proceedings be instituted by, or against, the seller, then the said buyer may enter upon any premises where the said hops may be found and take immediate possession thereof, and upon giving ten days' written notice to the seller of his intention to do so, may sell the same at public or private sale, and out of the proceeds thereof retain sufficient to repay said advances and the said liquidated damages and the costs of the said sale, and the balance, if any there be, pay over to the said seller or his representatives.

Seventh—This contract is not transferable by the said seller, and the said seller shall not sell, assign, or transfer his interest in this contract, or any part thereof, without the written consent of the said buyer, and that the said seller shall not at any time lease or sub-let the above described land, or any part thereof, or sell the same or any part thereof, and the said seller shall not at any time allow the said lands and premises, or any part thereof, to become encumbered by any mortgage, judgment, or other lien whatsoever without the written consent of the said buyer, and that the said seller shall

not in any way or manner jeopardize or interfere with the delivery of the said hops, or any part thereof under this contract, and that in case the said seller shall violate any of the provisions and conditions in this contract on his part to be performed, or should bankruptcy proceedings be instituted by, or against, the seller, then and in that case the said buyer shall have the right at his option to rescind this contract, and immediately upon such rescission, he, the said buyer shall have the right of action against the said seller for the recovery of any and all damages resulting on account thereof to the said buyer.

Eighth—It is agreed that all hops sold hereunder shall be within the grower's salable allotment in accordance with the provisions of the Federal Hop Marketing Agreement and Order, and if the quantity contracted hereunder shall exceed such allotment, this contract shall cover only the grower's salable allotment. The hops covered hereby are entitled to priority over any and all other hops produced from said property as regards both allotments and handling certificates. If said hops are not allocated and handling certificates therefor are not available by October 15th prior to such final delivery date, then the time for taking delivery by the buyer shall be, and hereby is, extended for a reasonable time after such allotments are made and certification is available.

In Witness Whereof, the said parties hereto have set their hands the day and year first above written.

.....,

Seller.

.....,

Buyer.

State of Oregon,
County of Marion—ss.

On this 20th day of August, 1947, personally came before me, a Notary Public in and for said County, the within named Kilian Smith to me known to be the identical person described in and who executed the within instrument and acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein named.

Witness my hand and notarial seal this 20 day of August, 1947.

.....,

Notary Public.

My Commission expires:

EXHIBIT B

(Copy)

This Agreement, Made this 19th day of August, 1947, between Killian Smith of Route 1, Aurora, Oregon, hereinafter called the Seller, and Hugo V. Loewi, Inc. of 33 Water Street, New York City, N.Y., hereinafter called the Buyer, Witnesseth:

First—In consideration of One Dollar (\$1.00) paid to the seller by the buyer, at the time of signing this instrument, receipt whereof is hereby acknowledged, and of the agreements hereinafter contained on the part of the buyer, the seller agrees to cultivate and complete the cultivation of about 24 acres of land now planted in hops, during the year 1947, consisting of 24 acres planted in fuggle hops, .. acres planted in hops, and on the following described real estate, to-wit: situate about 2½ miles Northwest of Donald on the Aurora-Newberg highway on what is known as the old Novvak farm in Marion County, State of Oregon, and to harvest, cure and bale the hops grown thereon in said year 1947 in a careful and husbandmanlike manner, and the seller does hereby bargain and sell, and upon ten days' notice in writing therefor, agrees to deliver and to cause to be delivered to the buyer, not later than the 31st day of October of said year f.o.b. cars or in warehouse at Salem, Oregon, free from all liens and encumbrances of any kind and nature entire crop surplus hops over existing contract estimated at fourteen

thousand pounds (14,000 lbs.) of fuggle hops and
..... thousand pounds (..... lbs.) of
..... hops grown on said premises, and
in bales weighing not less than 185 pounds and
not more than 210 pounds each, in new 24 ounce
baling cloth (5 pounds tare per bale to be allowed);
that such hops shall not be the product of the first
year's planting, and not affected by spraying or
mold, but shall be of prime quality, in sound con-
dition, good color, fully matured, cleanly picked,
free from damage by vermin, properly dried, cured
and baled, and in good order and condition. The
buyer under and by this contract shall have the
preference of selection, both as to quantity and
quality over all other persons who may hereafter
make contracts in relation to hops produced from
said farm, and said buyer, for the purpose of
examining and inspecting the same, may, at any
time, and until the full performance of this agree-
ment, have free access to the above described
premises, or any other premises where said hops
may be.

The price to be paid for the hops to be delivered
shall be the Grower's market price for the kind and
quality of hops delivered containing eight (8%)
percent of leaves and stems and six (6%) percent,
or more, of seeds; the said Grower's market price
may be selected by the Seller on any day between
August 19, 1947 and October 31, 1947, both dates
inclusive, and the Seller must notify the Buyer in
writing of his selection on the day he selects. If

the Seller does not select and notify then the Growers' market price of October 31, 1947 shall constitute the price for such hops, however, the Buyer agrees that the minimum price for the kind and quality of hops described herein and to be delivered under the terms of this contract shall be Eighty-one (81c) cents per pound.

It is further understood and agreed that in the event the leaf and stem content be less than eight (8%) percent, then the minimum price, or the market price as selected and agreed upon, will be increased one (1c) per pound for each one (1%) percent reduction in leaf and stem content below eight (8%) percent; and in the event the leaf and stem content exceeds eight (8%) percent, then the minimum price, or the market price as selected and agreed upon, will be reduced one (1c) cent per pound for each one (1%) percent increase of leaf and stem content to and including ten (10%) percent.

The determination of the leaf and stem content, as aforesaid, shall be on the basis of an analysis made by the Oregon State Department of Agriculture, or by an authorized governmental agency.

The price to be paid by the buyer for the hops to be delivered hereunder shall be the Growers' ceiling price or prices as established by the Office of Price Administration, or other Governmental Agency, for the kind and quality of hops delivered hereunder. In the event that no such ceiling price is in effect, then the price to be paid for the hops

to be delivered shall be the Grower's market price for the kind and quality of hops delivered; the said Grower's market price may be selected by the Seller on any day between, 19.., and, 19.., both dates inclusive, and the Seller must notify the Buyer in writing of his selection on the day he selects. If the Seller does not select and notify then the Grower's market price of, 19.. shall constitute the price for such hops, however, the Buyer agrees that the minimum price for the kind and quality of hops described herein and to be delivered under the terms of this contract shall be (....) cents per pound.

Second—The buyer does hereby purchase the above described quantity of said hops and agrees to pay therefor by check, draft, or in lawful money of the United States of America, on the delivery thereof and acceptance by the buyer, and within the time and conditions herein provided, the price or prices as aforestated for each pound thereof which shall be delivered to and accepted by the buyer, who is to have the right to inspect the same before acceptance, and to accept any part less than the whole of the hops so bargained for, should for any cause the quantity of hops of the quality, character and kind above described, and which shall have been raised, picked and harvested from said premises and tendered for acceptance be less than the amount herein bargained and sold; and upon the said buyer giving said notice to deliver as herein

fixed tendering to the seller the full amount of the purchase price thereof in lawful money, after deducting any advances made and interest thereon, the title and ownership and the right to the immediate possession of the said hops shall at once vest and be in the said buyer. In order to enable the seller to produce and harvest said crop and put the same in the condition herein agreed, the buyer will advance and loan to the seller such sums of money as may be required by the seller to defray the necessary expenses of cultivating and picking such hops, and of harvesting and curing the same and for such purposes only, not to exceed, however, twenty-five (25c) cents for each pound of hops herein bargained and sold and which may be grown on said lands, such advances to bear interest at the rate of no percent per annum. Said advances to be paid in the following manner: .. cents per pound or \$.
... on or about 19..; .. cents per pound or \$. on or about 19..; .. cents per pound or \$. on or about 19..; 25 cents per pound or \$3,500.00 on or about August 20, 1947; .. cents per pound or \$. on or about 19..; provided, such sums are actually required for the cultivation, picking, drying and baling of said hops, and that, if before, at, or during the time of picking such hops, they are not in such condition so as to produce the quality of hops called for under the terms of his agreement, then in such event, the buyer shall be discharged from any obligation to make any advances or

further advances, and from the obligation to receive the whole or part of said hops; and that this instrument shall then stand and be in force as a chattel mortgage upon the whole of said hop crop for any advances which shall have been made, or may be made, and interest thereon.

Third—The said parties hereto further agree that as soon as the picking of the said hops is commenced the seller shall insure his hop houses on said premises and the entire crop of hops growing thereon against damage by fire for the full market value thereof and until the delivery under this contract, such insurance to be placed in only good solvent fire insurance companies. The policy thereon shall provide that the loss, if any, shall be paid to the buyer; but if the seller fails to procure such insurance or to pay for the same, the buyer shall have the right to procure such insurance in his own name, or in that of the seller at the buyer's option at any time after commencement of picking. The seller agrees to repay to the buyer at the time of delivery all premiums on such insurance with interest at the rate of 6 percent per annum.

Fourth—All sums of money to be advanced under the terms of this contract are payable only at the office of the buyer in Salem, Oregon, upon ten days' written request and notice by the seller to the buyer therefor; such money may be forwarded either in cash or by check or draft by mail, or express, at the seller's risk and expense. It is further agreed

between the parties hereto that the times when the said moneys shall be advanced, and when the said hops shall be delivered pursuant to this contract, are of the essence of this contract, and that failure upon the part of the buyer to advance said money at said time, the seller not then being in default, shall give the seller the right to rescind the contract at his option, and the failure upon the part of the seller to deliver the hops within the time and in the condition and of the quality provided for by this contract, the buyer not then being in default, shall give the buyer the right to rescind the contract at his option.

Fifth—The parties hereto further agree that upon the breach of the terms of this contract by either party, the difference between the contract price of said hops and the market value thereof at the time and place of delivery shall be considered and is hereby agreed to be the measure of damages, which may be recovered by the party not in default for such breach, and the said difference between the said contract price and the market value thereof is hereby agreed and fixed and determined as liquidated damages.

Sixth—That for and in consideration of the said 25 cents per pound, not exceeding in all the sum of Three thousand five hundred and no/100 Dollars, hereinbefore agreed to be advanced by the buyer, and in consideration of the faithful performance of the said contract by the seller and for the pay-

ment of said liquidated damages, the seller does hereby bargain, sell, transfer, set over and mortgage unto the said buyer, the entire crop of hops growing and raised upon the premises above described in the year 1947, to secure unto the said buyer the repayment of said advances and interest and the said liquidated damages upon the demand of said buyer, or in case the said seller shall part with the possession of any of said hops, or remove or undertake to remove any thereof, out of said Marion County, or suffer the same to be attached or levied upon by any creditor of said seller, or should bankruptcy proceedings be instituted by, or against, the seller, then the said buyer may enter upon any premises where the said hops may be found and take immediate possession thereof, and upon giving ten days' written notice to the seller of his intention to do so, may sell the same at public or private sale, and out of the proceeds thereof retain sufficient to repay said advances and the said liquidated damages and the costs of the said sale, and the balance, if any there be, pay over to the said seller or his representatives.

Seventh—This contract is not transferable by the said seller, and the said seller shall not sell, assign, or transfer his interest in this contract, or any part thereof, without the written consent of the said buyer, and that the said seller shall not at any time lease or sub-let the above described land, or any part thereof, or sell the same or any part thereof, and the said seller shall not at any time allow the said

lands and premises, or any part thereof, to become encumbered by any mortgage, judgment, or other lien whatsoever, without the written consent of the said buyer, and that the said seller shall not in any way or manner jeopardize or interfere with the delivery of the said hops, or any part thereof under this contract, and that in case the said seller shall violate any of the provisions and conditions in this contract on his part to be performed, or should bankruptcy proceedings be instituted by, or against, the seller, then and in that case the said buyer shall have the right at his option to rescind this contract, and immediately upon such rescission, he, the said buyer shall have the right of action against the said seller for the recovery of any and all damages resulting on account thereof to the said buyer.

Eighth—It is agreed that all hops sold hereunder shall be within the grower's saleable allotment in accordance with the provisions of the Federal Hop Marketing Agreement and Order, and if the quantity contracted hereunder shall exceed such allotment, this contract shall cover only the grower's saleable allotment. The hops covered hereby are entitled to priority over any and all other hops produced from said property as regards both allotments and handling certificates. If said hops are not allocated and handling certificates therefor are not available by October 15th prior to such final delivery date, then the time for taking delivery by the buyer shall be, and hereby is, extended for a reasonable

time after such allotments are made and certification is available.

In Witness Whereof, the said parties hereto have set their hands the day and year first above written.

.....

Seller

.....

Buyer

State of Oregon,
County of Multnomah—ss.

I, Kilian W. Smith, being first duly sworn, depose and say that I am the Plaintiff in the above entitled action; and that the foregoing Complaint is true as I verily believe.

/s/ KILIAN W. SMITH.

Subscribed and sworn to before me this 6th day of March, 1948.

[Seal] /s/ WILLIAM E. DOUGHERTY,
Notary Public for the State of Oregon.

My Commission Expires Oct. 15, 1951.

[Endorsed]: Filed March 16, 1948.

In the Circuit Court of the State of Oregon
For the County of Marion

No. 34864

KILIAN W. SMITH,

Plaintiff,

vs.

HUGO V. LOEWI, INC., a corporation,

Defendant.

NOTICE OF EXTENSION TO FILE PETITION
AND BOND FOR REMOVAL OF CAUSE

To: Maguire, Shields & Morrison, attorneys for
plaintiff.

Please take notice that Hugo V. Loewi, Inc., a corporation, the defendant in the above entitled cause, will on the 26th day of March, 1948, at 9:30 o'clock in the forenoon of that day, file in the Circuit Court of the State of Oregon for the County of Marion in said State, and in the Clerk's office thereof, in which said action is now pending, its petition and bond for removal of the said cause from the said Court to the District Court of the United States for the District of Oregon, and that on the 26th day of March, 1948, at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, said petition and bond will be called up for hearing and disposition before the above Court in which this action is pending, at

which time and place you may be present if you so elect.

Copies of said petition and bond are herewith served upon you.

Dated this 25th day of March, 1948.

KERR & HILL,
Attorneys for
Defendant Petitioner.

[Endorsed]: Filed March 26, 1948.

In the Circuit Court of the State of Oregon
For the County of Marion

No. 34864

KILIAN W. SMITH,

Plaintiff,

vs.

HUGO V. LOEWI, INC., a corporation,

Defendant.

PETITION FOR REMOVAL OF CAUSE TO
THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF ORE-
GON

To The Circuit Court of the State of Oregon in and
for the County of Marion:

The petition of Hugo V. Loewi, Inc., a corpora-
tion, defendant in the above entitled action, respect-
fully shows:

I.

The above entitled action has been brought in this County and is now pending therein.

II.

Said action is of a civil nature at law, of which the District Courts of the United States have original jurisdiction, in that the suit is one to recover damages alleged to have been sustained by the plaintiff as the result of an alleged breach of contract on the part of the defendant.

III.

That petitioner appears herein specially and solely for the purpose of removing said cause to the United States District Court in and for the District of Oregon, upon the ground and for the reason that the controversy in said action is between citizens of different states, in that your petitioner, Hugo V. Loewi, Inc. was at the time of commencement of this action and still is a corporation created and existing under and by virtue of the laws of the State of New York, and was then and still is a resident and citizen of said State of New York and not a resident or citizen of the State of Oregon, whereas the said plaintiff was at the time of commencement of this action and still is, a citizen of the State of Oregon, residing in Marion County in said State.

IV.

That the amount in controversy at the time of

the commencement of this action and at the present time exceeds the sum of \$3,000.00, exclusive of interest and costs.

V.

That the time for your petitioner, as defendant in this action, to move, answer or plead to the complaint in said action has not expired and will not so expire until the 26th day of March, 1948.

VI.

Petitioner herewith presents a good and sufficient bond, as provided by statute, that it will enter in such District Court of the United States for the District of Oregon within thirty days from the filing of this petition, a certified copy of the record in this action, and for the payment of all costs which may be awarded by said Court if the said District Court shall hold that this action was wrongfully or improperly removed thereto.

Wherefore, petitioner prays that this Court proceed no further herein, except to make an order of removal and to accept the said bond, and to cause the record herein to be removed into the District Court of the United States for the District of Oregon.

HUGO V. LOEWI, INC.,
a corporation.

By /s/ ROBERT M. KERR,
Its Attorney.

State of Oregon,
County of Multnomah—ss.

I, Robert M. Kerr, being first duly sworn, depose and say:

That I am one of the attorneys for the defendant in the above entitled cause, the petitioner herein; that I have read the foregoing petition and that I believe it to be true; that said petitioner is absent from and is a non-resident of the State of Oregon and County of Marion in which said suit is brought, and that I make this affidavit for the reason that petitioner is absent from and is a non-resident of the said County of Marion in which said action is brought.

/s/ ROBERT M. KERR.

Subscribed and sworn to before me this 25th day of March, 1948.

[Seal] /s/ ALBERT L. NELSON,
Notary Public for Oregon.

My commission expires 12-30-50.

In the Circuit Court of the State of Oregon
For the County of Marion

No. 34864

KILIAN W. SMITH,

Plaintiff,

vs.

HUGO V. LOEWI, INC., a corporation,

Defendant.

ORDER OF REMOVAL

This cause coming on for hearing upon petition of Hugo V. Loewi, Inc., a corporation, the defendant in the above entitled cause, for an order removing this cause to the District Court of the United States for the District of Oregon, and it appearing to this Court that the defendant has filed its petition for such removal in due form and within the required time and that the defendant has filed its bond duly conditioned as provided by law, and it being shown to the Court that the notice required by law of the filing of said bond and petition, had prior to the filing thereof been served upon the plaintiff herein, which notice the Court finds was sufficient and in accordance with the requirements of the statutes, and it appearing to this Court that this is a proper cause for removal to said District Court of the United States, this Court does now hereby accept and approve said bond and said peti-

tion and does order this cause to be removed to the District Court of the United States for the District of Oregon, pursuant to Sections 28 and 29 of the Judicial Code of the United States, and that all other proceedings of this Court be stayed, and the Clerk is hereby directed to make up the record in said cause for transmission to said Court forthwith.

Dated this 26th day of March, 1948.

/s/ E. M. PAGE,

Judge of the Circuit Court.

[Endorsed]: Filed March 26, 1948.

State of Oregon,
County of Marion—ss.

I, H. A. Judd, County Clerk of the above named County and State and ex-officio Clerk of the Circuit Court of the County of Marion, State of Oregon, do hereby certify that the foregoing copy of Complaint, Summons, Notice of Intention to File Petition and Bond for Removal; Petition for Removal, Bond for Removal and Order of Removal in re: Kilian W. Smith vs. Hugo V. Loewi, Inc., a corporation, No. 34864 has been by me compared with the original and that it is a correct transcript therefrom and of the whole of such original record or file as the same appears of record or on file in my office and in my care and custody.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at Salem, Oregon, this 5th day of April, A.D. 1948.

H. A. JUDD,

County Clerk.

[Seal] By /s/ R. G. HOWARD,
Deputy.

[Endorsed]: Filed April 23, 1948.

In the District Court of the United States
For the District of Oregon
Civil Action, File No. 4083

KILIAN W. SMITH,

Plaintiff,

vs.

HUGO V. LOEWI, INC., a corporation,

Defendant.

MOTION TO DISMISS, TO STRIKE AND
FOR MORE DEFINITE STATEMENT

The defendant moves the Court as follows:

1. To dismiss the first cause of action set forth in the complaint on file herein because the same fails to state a claim against the defendant upon which relief can be granted.

2. In the event the said first action is not dismissed, that the Court order stricken from the com-

plaint, as redundant, immaterial and impertinent, each of the following:

(a) In paragraph IV, page 2, lines 2 and 3, the words “defendant inspected plaintiff’s said Cluster hops growing on said farm”.

(b) In paragraph V, page 2, lines 12, 13 and 14, the words “except to the extent that such performance was waived by defendant, or prevented by its acts or conduct as herein alleged”.

(c) All of paragraph VI on page 2.

(d) All of paragraph IX on page 3, except only the words, in lines 23 to 25, “on or about October 16, 1947, defendant refused to pay for plaintiff’s said Cluster hops on the stated grounds that they were dirty picked and badly blighted”.

(e) In the event the matter specified in (d) is not ordered stricken, that the Court order stricken from paragraph IX on page 3 the words, in lines 29 to 32, “Said hops were not any more badly blighted than when defendant inspected and contracted to buy the same, or than when defendant subsequently inspected them and instructed plaintiff to continue picking the same”.

3. In the event the matter specified in (b) applicable to paragraph V on page 2 is not ordered stricken, then the defendant moves that the plaintiff be ordered to make a more definite statement of the matters stated in said paragraph V, in the following respects:

(a) The extent to which the plaintiff did not duly perform the terms and conditions of the contract on his part to be performed.

(b) In what manner such performance was waived by the defendant.

(c) In what manner such performance was prevented by the defendant.

(d) The alleged acts or conduct of the defendant in said paragraph V referred to.

KERR & HILL,
/s/ ROBERT M. KERR,
/s/ STUART W. HILL,
Attorneys for Defendant.

NOTICE OF MOTION

To: Roy F. Shields, William E. Dougherty, Maguire, Shields, Morrison & Bailey, Attorneys for Plaintiff:

Please take notice that the undersigned will bring the foregoing motion on for hearing before this Court on the 10th day of May, 1948, at 10 o'clock a.m., or as soon thereafter as counsel may be heard.

/s/ ROBERT M. KERR,
Of Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed April 28, 1948.

[Title of District Court and Cause.]

ORDER RESERVING DECISION
ON MOTION

Plaintiff appearing by Mr. R. B. Kester and Mr. William E. Dougherty, of counsel, and the defendant by Mr. R. M. Kerr, of counsel. Whereupon, this cause comes on to be heard upon the motion of the defendant for an order dismissing the complaint; to strike certain portions of the complaint, and for a more definite statement, and the Court having heard the arguments of counsel, reserves its decision.

May 10, 1948.

[Title of District Court and Cause.]

REPLY TO COUNTERCLAIM

Now comes plaintiff and for reply to defendant's counterclaim denies each and every allegation, thing and matter contained therein and the whole thereof except insofar as admitted in plaintiff's complaint.

ROY F. SHIELDS,

/s/ WILLIAM E. DOUGHERTY,
MAGUIRE, SHIELDS,
MORRISON & BAILEY,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed June 21, 1948.

[Title of District Court and Cause.]

AMENDED ANSWER

For answer to the complaint of the plaintiff in the above entitled cause, the defendant says:

For answer to the first cause of action therein:

First Defense

The complaint in its first cause of action fails to state a claim against defendant upon which relief can be granted.

Second Defense

1. Defendant admits paragraphs I and II of the first cause of action.

2. Answering paragraph III, defendant admits the allegations therein except that defendant denies that defendant has been or is transacting in the State of Oregon the business of selling hops.

3. Answering paragraph IV, defendant admits that on or about August 19, 1947 defendant entered into a contract in writing, a copy of which contract is attached to the complaint as Exhibit "A"; defendant denies each and every other allegation in said paragraph IV.

4. Defendant denies all the allegations of paragraph V except only that defendant admits that pursuant to the aforesaid contract defendant did advance to plaintiff \$3,000.00.

5. Defendant denies all the allegations of paragraph VI.

6. Defendant denies all the allegations of paragraph VII, except that the defendant admits that the said hops were placed in storage by the plaintiff, for his own account, and that, with the defendant's assent, they were there made available to the defendant for inspection. The defendant admits that it sampled and weighed the hops.

7. Defendant admits the allegations of paragraph VIII except that defendant denies that the hops therein referred to were inspected by the United States Department of Agriculture, and denies that the sales price for said hops was 85 cents per pound or that the contract sales price therefor was 84 cents per pound, or any other sum.

8. Defendant denies all of paragraph IX except only that defendant admits that on or about October 16, 1947 defendant did reject and refuse to pay for the hops therein referred to.

9. Defendant denies all of paragraph X except only that defendant admits that the contract therein referred to purported to constitute a lien on the hops.

10. Defendant denies all of paragraph XI except only that defendant admits that defendant has paid to plaintiff \$3,000.00 as a loan and advance pursuant to the aforesaid contract.

11. Defendant denies paragraph XII except

only that defendant admits that plaintiff made demand upon defendant for a sum of money which demand was refused by defendant.

12. Defendant denies each and every allegation of the first cause of action not herein admitted or specifically denied.

Third Defense

Plaintiff failed to perform the provisions of the contract referred to in plaintiff's complaint on plaintiff's part to be performed, the same being conditions precedent on plaintiff's part to be performed, in that plaintiff failed to harvest, cure and bale in a careful and husbandlike manner the hops grown in the year 1947 on the acreage described in said contract, and that the 1947 crop hops produced by plaintiff on said premises and tendered to defendant under said contract were affected by mold, were not of prime quality, were not in sound condition, were not of good color, were not fully matured, were not cleanly picked, and were not in good order and condition, and that the plaintiff wholly failed to deliver or tender to defendant or to appropriate unconditionally to the said contract, with or without the defendant's assent, hops grown in the year 1947 of the type, quality, grade and condition required by the said contract.

Counterclaim

Plaintiff owes to defendant \$3,000.00 for money lent and advanced to plaintiff by defendant, on or about August 19, 1947, as an advance to defray

necessary production costs under the contract referred to in plaintiff's first cause of action herein. Defendant thereafter and on or about October 16, 1947 notified plaintiff that the hops tendered to defendant by plaintiff under said contract were not of the grade, quality or condition called for by said contract and therefore were not accepted by the defendant, and defendant thereupon demanded of plaintiff the repayment of said \$3,000.00, but plaintiff has wholly failed and refused to pay to defendant any part of said advance and loan and no part thereof has been repaid to defendant.

For answer to the second cause of action in plaintiff's complaint:

First Defense

1. Defendant admits paragraph I except that defendant denies that defendant has been or is transacting in the State of Oregon the business of selling hops.

2. Defendant admits paragraphs II, III, IV, and V.

3. Defendant denies the allegations of paragraph VI except only that defendant admits that the purchase price for the hops therein referred to was \$9,997.26, and that defendant paid to plaintiff, as an advance, \$3,500.00 on that purchase price.

4. Answering paragraph VII, defendant denies the same except that defendant admits that on several occasions the plaintiff demanded of defendant payment of \$6,497.26.

Second Defense.

At the time of delivery to defendant and acceptance by defendant of the hops referred to in plaintiff's second cause of action herein, and on or about October 25, 1947, defendant did tender to plaintiff \$3,497.26 in full payment of the agreed and contract price for said hops less the advance of \$3,500.00 previously paid by defendant to plaintiff on said purchase price, and less, also, an advance of \$3,000.00 paid to plaintiff by defendant under the contract referred to in plaintiff's first cause of action herein, and defendant at all times since that date has made and does now make a continuing tender of said sum of \$3,497.26, the same being the full and only sum owing or due from defendant to plaintiff. Plaintiff refused and rejected and all times has continued to refuse and reject said tender of payment.

Wherefore defendant prays judgment that the complaint of plaintiff be dismissed as to its first cause of action, and against the plaintiff in the sum of \$3,000.00 and interest thereon from August 19, 1947, and for defendant's costs.

KERR & HILL,

/s/ ROBERT M. KERR,

/s/ STUART W. HILL,

Attorneys for Defendant.

United States of America,
District of Oregon—ss.

I, Stuart W. Hill, being first duly sworn, depose

and say: That I am one of the attorneys for the defendant in the above-entitled cause; that I have read the foregoing Amended Answer and believe it to be true; that said defendant is absent from and a non-resident of the District of Oregon in which said cause is pending, and that I make this affidavit for that reason.

/s/ STUART W. HILL.

Subscribed and sworn to before me this 28th day of January, 1949.

[Seal] /s/ R. M. KERR,
Notary Public for Oregon.

My Commission Expires 2/5/51.

State of Oregon,
County of Multnomah—ss.

I hereby certify that I have prepared the foregoing copy of Amended Answer and have carefully compared the same with the original thereof; and that it is a correct copy therefrom and of the whole thereof.

That the said Amended Answer in my opinion is well founded in law.

Dated Jan. 28, 1949.

/s/ STUART W. HILL,
Of Attorneys for Defendant.

[Endorsed]: Filed January 28, 1949.

In the District Court of the United States
For the District of Oregon

Civil No. 4082

FRED GESCHWILL,

Plaintiff,

vs.

HUGO V. LOEWI, INC.,

Defendant.

Civil No. 4083

KILIAN W. SMITH,

Plaintiff,

vs.

HUGO V. LOEWI, INC.,

Defendant.

MEMORANDUM OF DECISION

The ground for decision in the Nusom case, filed today, applies to these cases. In the Geschwill case the contract was made after the hops were known to be mildewed. In the Smith case the grower asked for directions, and was encouraged by the buyer to go further into buyer's debt, after both parties knew the hops were mildewed.

Under these circumstances, the buyer cannot now reject the hops on the ground that the hops do not comply with the contract. This would be abhorrent to equity.

Dated June 15, 1949.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed June 15, 1949.

In the United States District Court
For the District of Oregon

Civil Action No. 4083

KILIAN W. SMITH,

Plaintiff,

vs.

HUGO V. LOEWI, INC.,

Defendant.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This action was tried at Portland, Oregon, before the undersigned Judge of the above-entitled Court. Plaintiff appeared in person and by Randall B. Kester and William E. Dougherty of his attorneys, and defendant appeared by Robert M. Kerr and Stuart W. Hill, its attorneys. Both parties waived jury trial, and the issues were tried by the Court.

It appearing that this action involved common questions of law and fact with the actions of Fred Geschwill, plaintiff, vs. Hugo V. Loewi, Inc., defendant, Civil Action No. 4082, and O. L. Wellman, plaintiff, vs. John I. Haas, Inc., defendant, Civil Action No. 4158, the parties consented and the Court ordered that said three actions be tried jointly and that the evidence in any of the actions should be deemed to have been taken and heard and should be considered in each of the actions to the extent

that such evidence was pertinent, material and relevant.

The joint trial of the three actions began on January 25, 1949 and concluded on February 5, 1949. All parties to said actions offered evidence. The Court heard arguments of counsel for the respective parties, and the Court considered memorandum briefs on the facts and the law submitted by counsel for the respective parties.

The Court, being fully advised, having considered the evidence, arguments and briefs, and having handed down his memorandum of decision, now hereby makes the following

Findings of Fact

1. At the time of the commencement of this action and at all times herein mentioned plaintiff was and is a citizen of the State of Oregon and defendant was and is a corporation incorporated and existing under the laws of, and a citizen of, the State of New York.

2. The amount in controversy herein exceeds, exclusive of interest and costs, the sum of \$3,000.00; and this Court has jurisdiction of the subject-matter, the parties and the cause of action.

3. On or about August 19, 1947 plaintiff as seller and defendant as buyer entered into the written cluster hop agreement received in evidence herein. By said agreement plaintiff contracted to sell and defendant contracted to buy the entire crop of

cluster hops grown by plaintiff in 1947 on certain premises in Marion County, Oregon. Pursuant to said contract plaintiff cultivated and completed the cultivation of said premises and duly harvested, cured and baled said hops grown thereon in said year in a careful and husbandlike manner.

4. As a part of the same transaction plaintiff and defendant entered into another contract whereby plaintiff contracted to sell and defendant contracted to buy certain fuggle hops grown by plaintiff in 1947 on certain premises in Marion County, Oregon. Plaintiff duly performed all the terms and conditions on his part to be performed under said contract, and defendant received and accepted said fuggle hops, which consisted of 59 bales weighing 10,986 pounds net, at the price of 91 cents a pound. Against the total price of \$9,997.26 was applied the advance payment of \$3,500.00 made pursuant to said fuggle contract. The remaining balance was \$6,497.26. On October 25, 1947 defendant tendered plaintiff its check in the amount of \$3,497.26 bearing a notation that it was "for Balance on contract delivery 59 bales fuggles". In arriving at said amount defendant deducted the cluster contract advance hereinafter referred to. Plaintiff refused to accept the check because of the stated condition. Defendant did not at any time pay or offer to pay plaintiff without such condition said balance of \$6,497.26 due under said fuggle contract, or said sum of \$3,497.26, or any other sum, and said balance remains due and unpaid.

5. In 1947 there was, and defendant knew that there was, widespread mildew in cluster hop yards in the Willamette Valley in Oregon. The parties entered into said cluster hop contract shortly before picking time, and the hops which defendant contracted to buy were then formed and in existence on the vines. Before entering into said cluster hop agreement defendant inspected said cluster hop crop and defendant knew that said hop crop then showed some mildew and would in normal course show such mildew when picked and baled. Such mildew in said hops did not become more prevalent or pronounced after said agreement was entered into.

6. By said cluster hop agreement defendant contracted to make an advance payment to plaintiff of \$2,500.00 in order to enable plaintiff to defray the necessary expenses of cultivating and picking said hops and of harvesting and curing the same. The agreement provided that defendant would have a prior lien upon said hop crop for any such advance payment, in accordance with the chattel mortgage provisions of said agreement.

7. Said cluster hop agreement provided in substance that if said growing crop at or before the time of picking was not in such condition so as to produce the quality of hops called for under the terms of the agreement then the defendant buyer would be discharged from any obligation to make said advance. Before and at the time of picking defendant knew that there was mildew in plaintiff's

said crop of cluster hops, and that said crop when picked and baled would in normal course show such mildew. On or about August 26, 1947 defendant again inspected said hop crop during picking and before making the advance, and thereupon defendant elected to and did make the advance payment in the sum of \$3,000.00, a larger amount than called for by the contract. And defect which said hop crop may have had by reason of blight or mildew was apparent to defendant at the time of said inspection. Defendant at that time instructed plaintiff to continue picking said hops under said contract, and plaintiff did so in reliance upon defendant's said instruction and advance payment. The mildew in said crop did not thereafter become more pronounced or prevalent.

8. Plaintiff did everything he was bound to do for the purpose of putting the specific crop of cluster hops in a deliverable state and delivered the same in warehouse at the place and within the time agreed upon in said contract. On or about September 15, 1947, after said cluster hops had been picked, dried, cured and baled as aforesaid, plaintiff, with the assent of defendant, delivered at the Oregon Electric Company warehouse at Salem, Oregon, all of said cluster hops and set same aside for defendant. Thereafter, defendant inspected, sampled, marked and weighed said hops at that warehouse. The bales of hops constituting said crop were identified, segregated and appropriated to the contract. Plaintiff duly performed all of the terms

and conditions of the agreement between the parties on his part to be performed.

9. Said cluster hops so weighed by defendant consisted of 73 bales, and had a total net weight, as determined by defendant, of 14,103 pounds. Said hops contained nine per cent. leaves and stems and six per cent. or more of seeds, as determined by an authorized governmental agency in accordance with said agreement.

10. Said agreement provided that the price to be paid for the hops to be delivered would be the grower's market price for the kind and quality of hops delivered containing eight per cent. of leaves and stems and six per cent. or more of seeds, and that in the event the leaf and stem content exceeded eight per cent. then the market price would be reduced one cent per pound for each one per cent. increase of leaf and stem content to and including ten per cent. Pursuant to said contract, on or about September 18, 1947, plaintiff selected as the sale price for said cluster hops said grower's market price at that time which was 85 cents a pound, and duly notified defendant in writing thereof. Since the leaf and stem content was nine per cent., the contract price for said cluster hops was 84 cents a pound. The total contract price of said cluster hops was \$11,846.52.

11. Upon delivery as aforesaid plaintiff duly tendered said entire crop of cluster hops to defendant in warehouse at the place specified in said

agreement, and plaintiff was at all times ready, able and willing to give complete possession of said hops to defendant in exchange for the price. Defendant did not pay said purchase price or any part thereof except said partial advance payment. Said hops, as defendant knew, continued to be and are still held by the warehouseman. Defendant at all times has known that it could obtain said hops upon payment of the balance of said purchase price.

12. On or about October 16, 1947 defendant rejected and refused to pay for said cluster hop crop tendered by plaintiff. On several occasions after said balance became due and owing, plaintiff duly made demand on defendant for the payment thereof. Defendant refused to pay for said hop crop on the particular ground that said cluster hops were blighted and dirty picked, and on no other specific ground. By the term "blighted" it was meant that the hops showed some mildew effect as stated above, and by the term "dirty picked" it was meant that the hops contained over the average eight per cent. leaf and stem content. At the trial defendant advanced the same specific objections to the hops. Upon the facts neither claimed defect was material. Said crop of hops was not any more blighted or mildewed than when defendant contracted to buy the same, or when defendant elected to make the advance payment, or when defendant instructed plaintiff to continue picking. The leaf and stem content was within the tolerance allowed by the terms of said agreement. Said 1947 crop hops pro-

duced by plaintiff on said premises and tendered to the defendant under said contract were merchantable.

13. Plaintiff delivered the identical cluster hop crop which defendant contracted to buy. Defendant did not rely upon any warranty or representation, whether contained in the contract or otherwise, that said crop of hops would be any different in condition or quality than said crop actually was when tendered and delivered as aforesaid. Said hops were of substantially the average quality of such Oregon cluster hops actually accepted in 1947 by the hop trade generally and by defendant under contracts containing the same type of quality provisions. Said hops upon tender and delivery as aforesaid substantially conformed to the quality provisions of said contract.

14. On plaintiff's first cause of action, relating to the cluster hops, there became due and owing from defendant to plaintiff on October 31, 1947 the sum of \$8,846.52, being the contract price of \$11,846.52 less the advance of \$3,000.00. No part of said balance has been paid.

15. On plaintiff's second cause of action, relating to the fuggle hops, there became due and owing from defendant to plaintiff on October 31, 1947 the sum of \$6,497.26, being the contract price of \$9,997.26 less the advance of \$3,500.00. No part of said balance has been paid.

Upon the foregoing findings of fact the Court has determined and does hereby make the following

Conclusions of Law

1. Plaintiff substantially performed all of the terms and conditions of each of the agreements between the parties, with respect both to the fuggle and the cluster hops, on his part to be performed.

2. The property in said fuggle and said cluster hops passed to defendant.

3. Defendant wrongfully refused to and did not perform its obligation under each of said agreements.

4. On both causes of action the measure of plaintiff's recovery upon the facts here is, under Oregon law, the amount due under each said contract after deducting the respective advance payment.

5. Each advance payment having been credited against the respective amount due from defendant, defendant should take nothing under either of its counterclaims.

6. Plaintiff should have judgment against defendant for \$8,846.52 on his first cause of action, and for \$6,497.26 on his second cause of action, together with interest at the rate of six per cent. per annum from October 31, 1947 until the same

be paid in full, and with costs and disbursements;
and judgment will be entered accordingly.

Dated this 22nd day of September, 1949.

/s/ CLAUDE McCOLLOCH,
Judge.

Proposed form submitted by

/s/ WILLIAM E. DOUGHERTY,
/s/ RANDALL B. KESTER,
Of Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed September 22, 1949.

In the United States District Court
For the District of Oregon
Civil Action No. 4083

KILIAN W. SMITH,

Plaintiff,

vs.

HUGO V. LOEWI, INC.,

Defendant.

JUDGMENT

The Court having found the facts in this cause specially, stated separately its conclusions of law thereon, and directed the entry of this, the appropriate judgment, it is therefore

Considered, Ordered and Adjudged that plaintiff have and recover from the defendant the sum of \$8,846.52 and also the sum of \$6,497.26, with interest on each of said sums at the rate of six per cent per annum from October 31, 1947, and plaintiff's costs herein taxed at \$205.01.

Dated this 30th day of September, 1949.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed September 30, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Hugo V. Loewi, Inc., a corporation, defendant above named, hereby appeals to the Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 30th day of September, 1949.

KERR & HILL,

/s/ ROBERT M. KERR,

/s/ STUART W. HILL,

Attorneys for Appellant, Hugo V. Loewi, Inc., a corporation.

[Endorsed]: Filed October 10, 1949.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men By These Presents, that we, Hugo V. Loewi, Inc., a New York corporation, as principal, and National Surety Corporation, a New York corporation, as surety, are held and firmly bound unto Kilian W. Smith in the full and just sum of \$20,000.00, to be paid to the said Kilian W. Smith or his certain attorney, executor, administrator, or assigns; to which payment, well and truly to be made, we bind ourselves, jointly and severally, by these presents.

Sealed with our seals and dated this 10th day of October, 1949.

Whereas, lately at a session of the District Court of the United States for the District of Oregon in a suit pending in said Court, between Kilian W. Smith, as plaintiff, and Hugo V. Loewi, Inc., a New York corporation, as defendant, a judgment was rendered against the said defendant and the said defendant, Hugo V. Loewi, Inc., a New York corporation, having filed in said Court a notice of appeal to reverse the judgment in the aforesaid suit on appeal to the United States Court of Appeals for the Ninth Circuit, at a session of said Court of Appeals to be held at San Francisco, California.

Now, the condition of the above obligation is such that if the said defendant, Hugo V. Loewi, Inc., a New York corporation, shall prosecute its appeal to effect, and satisfy the judgment in full, together

with costs, interest, and damages for delay, if for any reason the appeal is dismissed, or if the judgment is affirmed, and satisfy in full such modification of the judgment and such costs, interest, and damages as the appellate court may adjudge and award if said Hugo V. Loewi, Inc., a New York corporation, fails to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

HUGO V. LOEWI, INC.,
a New York corporation.

[Seal] By /s/ ROBERT M. KERR,
Its Attorney in Fact,
Principal.

NATIONAL SURETY
CORPORATION,
a New York corporation.

[Seal] By /s/ W. B. GILHAM,
Its Attorney in Fact,
Surety.

Countersigned

PHIL GROSSMAYER CO.,
Resident Agents.

By /s/ W. B. GILHAM.

Form of bond and sufficiency of surety approved,
this 10th day of October, 1949.

/s/ CLAUDE McCOLLOCH,
U.S. District Judge.

Power of Attorney

Know All Men By These Presents, that Hugo V. Loewi, Inc., a corporation duly organized and existing under and by virtue of the laws of the State of New York, has made, constituted, and appointed, and by these presents does make, constitute, and appoint Robert M. Kerr, of Portland, in the State of Oregon, to be its true and lawful attorney, for it and in its name, place, and stead, to enter into, make, and execute, in an action pending in the District Court of the United States for the District of Oregon, entitled Kilian W. Smith, plaintiff, v. Hugo V. Loewi, Inc., a corporation, defendant, Civil Action No. 4083, a supersedeas bond, as principal, in the sum of \$20,000.00 or such other amount as may be necessary to comply with the order of the said Court fixing the amount of such bond, and to sign, seal, acknowledge, and deliver the same, in contemplation of an appeal from the judgment entered in said action on the 30th day of September, 1949.

In Witness Whereof, the said corporation has caused these presents to be signed by its officer thereunto duly authorized, and its corporate seal to be hereunto affixed, this 6th day of October, 1949.

HUGO V. LOEWI, INC.

[Corporate Seal]

By /s/ ROBERT OPPENHEIM,
Its President.

Attest:

/s/ ROBERT OPPENHEIM JR.,
Secretary.

State of New York,
County of—ss.

Personally appeared Robert Oppenheim, President, of said corporation, signer and sealer of the above instrument, he being thereunto duly authorized by the corporation above named, and acknowledged the same to be his free act and deed, and the free act and deed of said corporation, before me, this 6th day of October, 1949.

/s/ ARNOLD DE STEFANO,
Notary Public,
State of New York.

My Commission Expires March 30, 1951.

[Endorsed]: Filed October 10, 1949.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
RECORD ON APPEAL AND DOCKETING
APPEAL

The Motion of the defendant for extension of time for filing record on appeal and docketing appeal having been brought on for hearing and it appearing to the court that the facts set forth therein are true, and the court being fully advised in the premises,

It Is Ordered that the time within which the record on appeal may be filed in the Court of Appeals and the appeal docketed in the Court of

Appeals be and the same hereby is extended to and including the 17th day of December, 1949.

Dated this 18th day of November, 1949.

/s/ CLAUDE McCOLLOCH,
U.S. District Judge.

[Endorsed]: Filed November 21, 1949.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH DEFENDANT INTENDS TO RELY ON APPEAL

The defendant and appellant, Hugo V. Loewi, Inc., proposes on its appeal to the Court of Appeals for the Ninth Circuit to rely on the following points as error:

1. The court erred in finding that by the agreement on August 19, 1947, the plaintiff contracted to sell and the defendant contracted to buy the entire crop of cluster hops grown by the plaintiff in 1947 on his premises in Marion County, Oregon, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

2. The court erred in finding that pursuant to said contract the plaintiff duly harvested, cured, and baled said hops grown thereon in said year in a careful and husbandlike manner, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

3. The court erred in finding that the defendant knew that said crop of hops showed some mildew at the time said contract was entered into, and knew that said crop would in normal course show such mildew when picked and baled, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

4. The court erred in finding that such mildew in said hops did not become more prevalent or pronounced after said agreement was signed, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

5. The court erred in finding that before and at the time of picking the defendant knew that said crop, when picked and baled, would in normal course show such mildew, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

6. The court erred in finding that the defendant, on or about August 26, 1947, instructed the plaintiff to continue picking said hops under said contract, and the plaintiff did so in reliance upon such instruction, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

7. The court erred in finding that the mildew in said crop did not become more pronounced or prevalent after the defendant made the advance to the

plaintiff, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

8. The court erred in finding that the plaintiff did everything he was bound to do for the purpose of putting the specific crop of cluster hops in a deliverable state, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

9. The court erred in finding that the plaintiff, with the assent of the defendant, delivered his baled cluster hops to the warehouse and set them aside for the defendant, and appropriated them to the contract, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

10. The court erred in finding that the plaintiff duly performed all of the terms and conditions of the agreement which he was required to perform by the said contract, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

11. The court erred in finding that the defendant at all times knew it could obtain said hops upon payment of the balance of the purchase price, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

12. The court erred in finding that the defendant

refused to pay for said crop of hops on the ground that they were blighted and dirty picked, and on no other specific ground, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

13. The court erred in finding that by the term "blighted" it was meant that the hops showed some mildew effect, and by the term "dirty picked" it was meant that the hops contained over the average of eight percent leaf and stem content, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

14. The court erred in finding that at the trial the defendant advanced the same specific objection to the hops, that is, that they were blighted and dirty picked, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

15. The court erred in finding that upon the facts neither claimed defect was material, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

16. The court erred in finding that said crop of hops, at the time defendant rejected them, was not any more blighted or mildewed than when defendant contracted to buy the same, or when defendant elected to make the advance payment, or when defendant instructed plaintiff to continue picking,

and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

17. The court erred in finding that said cluster hops, when tendered to the defendant, were merchantable, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

18. The court erred in finding that the plaintiff delivered the identical hop crop which the defendant contracted to buy, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

19. The court erred in finding that the defendant did not rely upon any warranty or representation, whether contained in the contract or otherwise, that said crop of hops would be any different in condition or quality than said crop actually was when tendered and delivered, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

20. The court erred in finding that said hops were of substantially the average quality of Oregon cluster hops accepted in 1947 by the hop trade generally and by defendant under contracts containing the same type of quality provisions, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

21. The court erred in finding that said hops, upon tender and delivery, substantially conformed to the quality provisions of the written agreement of August 19, 1947, and in basing the judgment thereon, such finding; being clearly erroneous and unsupported by substantial evidence.

22. The court erred in finding that there became due and owing from the defendant to the plaintiff the sum of \$8,846.52, the contract price less the advance.

23. The court erred in deciding that the plaintiff substantially performed all of the terms and conditions of the agreement between the parties with respect to the cluster hops on his part to be performed.

24. The court erred in deciding that the property in said cluster hops passed to the defendant.

25. The court erred in deciding that the defendant wrongfully refused to and did not perform its obligation under said contract of August 19, 1947.

26. The court erred in deciding that the measure of the plaintiff's recovery so far as the cluster hops are concerned, is, under the Oregon law, the difference between the amount claimed to be due under said contract and the amount realized from the resale of the plaintiff's hops.

27. The court erred in failing and refusing to apply the provision in said contract of August 19, 1947, which fixed and determined the measure of

damages as the difference between the contract price of the hops the defendant was obligated to accept, and the market value thereof.

28. The court erred in deciding that defendant should take nothing under its counterclaim.

29. The court erred in deciding that the judgment against the defendant relating to said cluster hops should include interest at the rate of six per cent per annum from October 31, 1947, to the date of judgment.

30. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Oppenheim: What was the result of the Schwarz analysis of Murphy mildewed hops?

Answer: I don't remember, but it was definitely impaired as compared with a prime, fully matured, ripe hop.

31. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Oppenheim: Is the brewing value a matter subject to chemical analysis?

Answer: Only as to the resin content, the Alpha, Beta, and Gamma resins in the hops.

32. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Oppenheim: Is it a matter that brewers do

know about and take some interest in; is that correct?

Answer: Some brewers don't make any examination. I would say the bulk of the brewers—I think there are about 420 active brewers in the United States, and I would say probably 300 or 320—this is again a guess on my part—make no chemical analysis of their hops. There are certain concerns that make laboratory tests, undoubtedly.

33. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Oppenheim: I believe you said the other day that some of the larger brewers and growers maintain their own laboratories?

Answer: I would say that all of the larger and some of the smaller ones have their own laboratories. It is becoming more and more so.

34. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Oppenheim: Do I understand you to say that such a burr, where there is just a slight trace of mildew on a petal, the brewing quality of that probably would not be affected?

Answer: That would be my judgment, that the hop outside of a little discoloration on the outside, is not seriously damaged. If they were all like that, the damage would be considered very slight and probably would not impair the value of the hops or the brewing value, as you express it.

35. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Bullis: From your experience in the analysis of hops you recognize, and of course it is common knowledge, that the soft resins of hops found in the lupulin are what go to make the flavor in the beer?

Answer: There are other constituents besides the soft resins.

36. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Bullis: Would you explain that?

Answer: The hop oils have a lot to do with aroma and flavor. The soft resins, I believe, are considered constituents, the constituent which imparts the bitterness to beer.

37. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Bullis: So that the volatile oils and soft resins are the desirable parts of the hop from the standpoint of making beer; is that correct?

Answer: I think so.

38. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Bullis: I will ask the Bailiff to hand you three exhibits, Nos. 25, 36, and 37, so that you may

have those before you. Referring to all of them generally, are those written reports signed by you giving the results of the chemical analyses of various lots of hops?

Answer: Yes.

39. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Bullis: Will you look down the list (referring to the report of September 20 made at the request of Mr. Paulus) until you find sample No. 64, and then will you state for us, refreshing your recollection on it from that report, what the result was of your analysis of that sample of the Smith cluster hops?

Answer: The Alpha resin was 4.81% ; Beta resin, 8.75% ; preservative value, 67.3.

40. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Bullis: How did you arrive at the preservative value figure which is there?

Answer: The preservative value is one index of the quality of the hop from a chemical standpoint, and it is arrived at by taking the percentage of Alpha resins and adding to that one-third of the percentage of Beta and multiplying that sum by 100. It just gives a convenient index for indicating the quality from the standpoint of the antiseptic properties of those soft resins.

Question: And the antiseptic property is one of the things that makes the beer keep; is that right?

Answer: That is correct.

Question: So that that is an index of some value in determining the quality of the hop; is that correct?

Answer: It is considered so.

41. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Bullis: Now, will you look at the next report which is dated January 15, 1948. I will ask you if that is the report of an analysis made to Mr. Smith on a batch of his '47 hops?

Answer: Yes.

Question: Would you give us likewise the results of that examination?

Answer: The Alpha resin, 5.05%; Beta resin, 9.55%; preservative value, 82.3.

42. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Bullis: Would you then look at the report of January 30 and looking at the first part of that report, give us the results of that examination of a sample of his 1947 clusters?

Answer: Alpha resin, 4.36; Beta resin, 9.63; preservative value, 75.7.

43. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Bullis: Now, referring down further in that report of January 30, and with these figures before you as to the results of three different samples from Mr. Smith's 1947 hops, how would you say that those figures compared with the average of the commercial lots of 1947 clusters which you had occasion to make such tests of?

Answer: Why, they run very close to that average value, I would say.

Question: Would you state into the record what the average of such analyses for Oregon was for 1947?

Answer: Of 29 commercial lots which we had occasion to test from the 1947 crop, the average values were: Alpha resins, 4.61; Beta resins, 8.75; preservative value, 75.3.

44. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Bullis: How do those compare with the figures in that same report given for his hops?

Answer: They are somewhat lower.

Question: So that his hops analyze somewhat higher than the average?

Answer: That particular sample did.

45. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Bullis: The other samples didn't give quite exactly the same results. Would you say that

it would be fair to take an average of the three different tests that were made; would that give a true picture?

Answer: I would have to know how the samples were drawn before I could answer that question. If the samples were properly drawn, representing a proper number of bales for sampling a lot, I should think an average of the three values would be all right to accept as representing the samples.

46. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Bullis: So that from the standpoint of chemical analyses, the average of those three different tests would be approximately the same as the average of the 1947 crop that you tested; is that correct?

Answer: I believe that would be calculated to about that, yes.

47. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Geschwill during the trial of Fred Geschwill v. Hugo V. Loewi, Inc., Civil Action No. 4082: In the hop itself, what is the substance that makes the hop useful for brewing beer?

Answer: They use what they call the lupulin.

48. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Geschwill during the trial of Fred Gesch-

will v. Hugo V. Loewi, Inc., Civil Action No. 4082: If mildew were to touch the outside petals and turn them reddish or orange colored, would that normally affect the lupulin on the inside of the hop?

Answer: Not if it is in the later season. I imagine if it is in the real early stage it wouldn't make no hop, but later on it don't affect it at all.

49. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Geschwill during the trial of Fred Geschwill v. Hugo V. Loewi, Inc., Civil Action No. 4082: What was the custom generally, in the business with respect to whether weighing in was an acceptance of hops?

Answer: That was the custom; when they was weighed, when they went over the scale and there was nothing wrong with the hops.

50. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Walker during the trial of Fred Geschwill v. Hugo V. Loewi, Inc., Civil Action No. 4082: Is that lupulin what the hop is used for in making beer?

Answer: That is what I understand, the main property of it.

51. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Walker during the trial of Fred Gesch-

will v. Hugo V. Loewi, Inc., Civil Action No. 4082: What is the understanding in the hop trade generally as to what use of the hop is made in making beer? That is, insofar as it is common knowledge in the hop business.

Answer: It is my general understanding that the hop is used primarily for flavor and aroma.

52. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Walker during the trial of Fred Geschwill v. Hugo V. Loewi, Inc., Civil Action No. 4082: What portion of the hop does that aroma come from?

Answer: From the lupulin, primarily, as I understand.

53. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Walker during the trial of Fred Geschwill v. Hugo V. Loewi, Inc., Civil Action No. 4082: If there was an attack of downy mildew sufficient to discolor the petals, make some of the petals turn a slightly reddish tinge, but not enough to get inside the petals, would that ordinarily affect the lupulin quality?

Answer: I never thought so. That, again, is a very debatable question. As you know, we have 1,200 or 1,400 brewers in the United States or whatever it may be—I do not have the number. Brewmasters, of course, do not—they might use them

or buy them even though they showed that discoloration.

54. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Walker during the trial of Fred Geschwill v. Hugo V. Loewi, Inc., Civil Action No. 4082: Even with some discoloration of the petals, the hop is usually considered marketable?

Answer: Yes, I would consider them so.

KERR & HILL,

/s/ ROBERT M. KERR,

/s/ STUART W. HILL,

Attorneys for

Defendant-Appellant.

State of Oregon,

County of Multnomah—ss.

I hereby certify that I have prepared the foregoing copy of Statement of Points on which Defendant Intends to Rely on Appeal and have carefully compared the same with the original thereof; and that it is a true and correct copy therefrom and of the whole thereof.

Dated December 5, 1949.

STUART W. HILL,

Of Attorneys for

Defendant-Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed December 5, 1949.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS
OF RECORD ON APPEAL

Defendant, Hugo V. Loewi, Inc., hereby designates for inclusion in the record on appeal the following portions of the record, proceedings, and evidence:

1. Transcript on removal from the Circuit Court of the State of Oregon for the County of Marion.
2. Motion to dismiss, to strike, and for more definite statement.
3. Order reserving decision on motion.
4. Amended answer.
5. Reply to counterclaim.
6. Findings of fact and conclusions of law.
7. Memorandum of decision.
8. Judgment.
9. Notice of appeal.
10. Supersedeas bond.
11. Order extending time for filing record on appeal and docketing appeal, entered November 18, 1949.
12. Statement of points on which defendant intends to rely on appeal.

13. This designation of contents of record on appeal, and all counterdesignations or further designations.

14. Complete typewritten transcript of the proceedings and testimony before the court at the trial of this case.

15. The following exhibits:

(a) Plaintiff's exhibits having the following numbers: 13, 14, 16, 17, 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33-A, 33-B, 33-C, 34, 35-A, 35-B, 35-C, 35-D, 35-E, 35-F, 35-G.

(b) Defendant's exhibits having the following numbers: 1, 2, 3, 4, 5, 6, 7, 8, 9, 36, 37, 42, 43, 44, 45, 45-A, 46, 47, 48, 49, 50, 51, 52-A, 52-B, 52-C, 52-D, 52-E, 53-A, 53-B, 53-C, 53-D, 53-E, 53-F, 53-G, 54-A, 54-B, 54-C, 54-D, 54-E, 54-F, 54-G, 55-A, 55-B, 55-C, 55-D, 55-E, 55-F, 56, 57-A, 57-B, 57-C, 57-D, 57-E.

KERR & HILL,

/s/ ROBERT M. KERR,

/s/ STUART W. HILL,

Attorneys for Defendant-
Appellant.

State of Oregon,
County of Multnomah—ss.

I hereby certify that I have prepared the foregoing copy of Designation of Contents of Record on Appeal and have carefully compared the same

with the original thereof; and that it is a true and correct copy therefrom and of the whole thereof.

Dated, 1949.

STUART W. HILL,

Of Attorneys for Defendant-
Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed December 5, 1949

[Title of District Court and Cause.]

ORDER FOR TRANSMITTAL
OF EXHIBITS

On motion of the defendant and appellant, Hugo V. Loewi, Inc.,

It Is Ordered That the Clerk of this court forward to the United States Court of Appeals for the Ninth Circuit, in connection with the appeal of the above-entitled cause, all of the original documentary exhibits in accordance with the usual practice of this court in regard to the safekeeping and transportation of original documentary exhibits.

It Is Further Ordered That the Clerk of this court be and he hereby is authorized to permit Kerr & Hill, attorneys of record for the defendant and appellant, to withdraw all of the other exhibits in this cause from the office of the Clerk of this court

in order that they may be shipped to the United States Court of Appeals for the Ninth Circuit.

Dated this 7th day of December, 1949.

/s/ CLAUDE McCOLLOCH,
U. S. District Judge.

[Endorsed]: Filed December 7, 1949.

[Title of District Court and Cause.]

APPELLEE'S DESIGNATION OF ADDI-
TIONAL CONTENTS OF RECORD ON
APPEAL

Kilian W. Smith, plaintiff and appellee, hereby designates the following additional portions of the record, proceedings and evidence in this cause to be included in the record on appeal herein to the United States Court of Appeals for the Ninth Circuit:

1. Plaintiff's Exhibits 10, 11, 12, 15, 18 and 23.
2. Defendant's Exhibits 38, 39, 40 and 41.
3. The proceedings and evidence (including the transcript of testimony and the exhibits) contained in the records on appeal to the United States Court of Appeals for the Ninth Circuit from the United States District Court for the District of Oregon in Civil Action No. 4082, Fred Geschwill, Plaintiff-appellee, vs. Hugo V. Loewi, Inc., a corporation, defendant-appellant, and in Civil Action No. 4158,

O. L. Wellman, plaintiff-appellee, vs. John I. Haas, Inc., a corporation, defendant-appellant. (Those two actions involve common questions of law and fact with this action; and on trial the parties to all three actions consented, and the District Court ordered, that the three actions be tried jointly and that the evidence in any of said actions should be deemed to have been taken and heard and should be considered in each of the actions so tried together to the extent that such evidence was pertinent, material and relevant.)

Dated at Portland, Oregon, this 14th day of December, 1949.

ROY F. SHIELDS,

/s/ RANDALL B. KESTER,

/s/ WILLIAM E. DOUGHERTY,
Of Attorneys for Plaintiff-
Appellee.

Receipt of copy acknowledged.

[Endorsed]: Filed December 14, 1949.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
RECORD ON APPEAL AND DOCKETING
APPEAL

The Motion of the defendant for extension of time for filing record on appeal and docketing ap-

peal having been brought on for hearing and it appearing to the court that the facts set forth therein are true, and the court being fully advised in the premises,

It Is Ordered that the time within which the record on appeal may be filed in the Court of Appeals and the appeal docketed in the Court of Appeals be and the same hereby is extended to and including the 31st day of December, 1949.

Dated this 15th day of December 1949.

/s/ CLAUDE McCOLLOCH,
U. S. District Judge.

[Endorsed]: Filed December 15, 1949.

[Title of District Court and Cause.]

DOCKET ENTRIES

1948

Apr. 23—Filed Transcript on Removal from Marion County.

Apr. 28—Filed motion to Dismiss, to Strike and for more Definite Statement.

May 10—Record of hearing on motion of deft. to dismiss complaint, to strike and for more definite statement argued and taken under advisement. McC

May 21—Filed Memorandum (See 4082). McC

June 1—Defts Answer to Ptffs complaint Killian W. Smith.

1948

June 21—Filed reply of plntf to counterclaim of defendant.

July 30—Filed memorandum of opinion (see Civ 4082) motions reserved to P.T. or T. McC

Dec. 13—Entered order setting for Pre trial Conf. on Jan. 17, 1949. Fee

Dec. 15—Entered order setting for trial on Jan. 25, 1949. McC

1949

Jan. 17—Filed stipulation re depositions for defendant & plaintiff.

Jan. 17—Filed depositions of Lamont Fry, James A. Byers and C. W. Paulus.

Jan. 17—Record of pre-trial conference. McC

Jan. 20—Issued subpena and 10 copies to Atty. Stewart Hill.

Jan. 22—Filed deposition of Kilian W. Smith.

Jan. 28—Issued Subpoena & one copy to Pltf.

Jan. 27—Record of trial before court. McC

Jan. 28—Filed subpena with return.

Jan. 28—Record of trial before court. McC

Jan. 28—Filed amended answer.

Feb. 3—Record of further trial before court; arguments & order allowing ptff to Feb. 17 to submit brief & deft. to March 2, 1949. McC

Mar. 4—Filed ptffs supplemental memorandum.

Mar. 17—Filed defts reply brief.

June 15—Filed ptff's reply memorandum.

June 15—Filed memorandum of decision (for ptff).
McC

1949

- July 25—Entered order setting hearing in settlement of Findings of Fact & Conclusions of Law for Sept 12, 1949. McC
- Sept. 7—Lodged Findings of Fact proposed by deft.
- Sept. 7—Filed objections to F & F & Con. of L proposed by ptff.
- Sept. 19—Record of hearing on Findings of Fact & Conclusions of Law—argued & reserved. McC
- Sept. 22—Filed & entered Findings of Fact & Conclusions of Law. McC
- Sept. 30—Filed defts objection to form of proposed judgment.
- Sept. 30—Filed & entered judgment for plaintiff for \$8,846.52 and \$6,497.26 & int. on both sums at 6% from Oct. 31, 1947. McC
- Sept. 30—Entered judgment in Lien Docket.
- Oct. 8—Filed plaintiff's cost bill.
- Oct. 10—Filed stipulation concerning amount of supersedeas bond.
- Oct. 10—Filed and entered order fixing amount of supersedeas bond. McC
- Oct. 10—Filed notice of application for taxation of costs.
- Oct. 10—Filed supersedeas bond.
- Oct. 10—Filed notice of appeal by defendant.
- Oct. 11—Mailed copy of notice of appeal to Roy F. Shields and William E. Dougherty.
- Oct. 26—Filed stipulation for order granting leave to amend supersedeas bond.

1949

Oct. 26—Filed and entered order granting leave to amend. McC

Nov. 15—Filed in duplicate transcript of testimony.

Nov. 18—Entered order extending time for filing record on appeal to December 17, 1949.
McC

Nov. 21—Filed motion for above order.

Nov. 21—Filed above order.

Dec. 5—Filed statement of points.

Dec. 5—Filed designation of contents of record.

Dec. 7—Filed and entered order for transmittal of exhibits. McC

Dec. 14—File appellee's designation of record on appeal.

Dec. 15—Filed and entered order extending time to file appeal. McC

United States District Court
District of Oregon
Civil No. 4083

KILIAN W. SMITH,

Plaintiff,

vs.

HUGO V. LOEWI, INC., a corporation,
Defendant.

January 27, 1949

Before: Honorable Claude McColloch,
Judge.

Appearances:

RANDALL B. KESTER,
WILLIAM E. DOUGHERTY,
MAGUIRE, SHIELDS, MORRISON &
BAILEY,

Attorneys for Plaintiff.

ROBERT M. KERR,
STUART W. HILL,
Attorneys for Defendant.

TRANSCRIPT OF TESTIMONY
AND PROCEEDINGS

Mr. Kester: In this case, if your Honor please, a number of exhibits have been previously identified in connection with the depositions and they have

been marked, up to and including as of this time, Exhibits 1 to 51, inclusive, including a quantity of samples, paper-wrapped samples, which I believe have been given [1*] No. 35.

In order to expedite matters, I will at this time offer all the documents and samples.

In this connection I will state that the samples were taken from Mr. Smith's crop, which is now in storage at the Oregon Electric warehouse in Salem. They were taken within the last few days.

The Court: They are admitted and, likewise, defendant's exhibits are admitted on the same basis, subject to any objections that may be made at this time or that hereafter may be made before the case is finally submitted.

Mr. Kerr: If there are any objections as to relevancy, they will be raised later.

The Court: They may be stated at any time prior to the submission of the case.

Mr. Kerr: Yes.

(The following exhibits were thereupon received in evidence:)

Defendant's Exhibit 1. Contract dated August 19, 1947, between Kilian Smith and Hugo V. Loewi.

Defendant's Exhibit 2. Agreement dated August 19, 1947, signed by Kilian W. Smith, relating to sale of Prime Hops. [2]

Defendant's Exhibit 3. Letter dated October 16, 1947, C. W. Paulus to Kilian Smith.

* Page numbering appearing at top of page of original Reporter's Transcript.

Defendant's Exhibit 4. Letter dated September 17, 1947, signed Kilian W. Smith to Hugo V. Loewi, Inc. (Selection of growers' market price).

Defendant's Exhibit 5. Letter dated October 3, 1947, signed Kilian Smith addressed to Hugo V. Loewi, Inc., authorizing inspection and grading, etc.

Defendant's Exhibit 6. Letter dated September 17, 1947, Kilian W. Smith to Hugo V. Loewi, Inc. (Selection of growers' market price).

Defendant's Exhibit 7. Check, August 20, 1947, C. W. Paulus, payable to Kilian Smith in amount \$3,500.

Defendant's Exhibit 8. Check, August 27, 1947, C. W. Paulus, payable to Kilian W. Smith, in amount \$3,000.

Defendant's Exhibit 9. Check, October 25, 1947, C. W. Paulus, payable to Kilian W. Smith, in amount \$3,497.26.

Plaintiff's Exhibit 10. Carbon copy of letter dated November 19, 1947, Maguire, Shields & Morrison to C. W. Paulus.

Plaintiff's Exhibit 11. Hop Sample Advice, dated September 10, 1947.

Plaintiff's Exhibit 12. Hop Sample Advice, dated October 4, 1947.

Plaintiff's Exhibit 13. Weight slip covering 73 bales, Kilian Smith hops. [3]

Plaintiff's Exhibit 14. Hop Inspection Certificate, dated September 15, 1947.

Plaintiff's Exhibit 15. Carbon copy of telegram dated September 8, 1947, C. W. Paulus to Hugo V. Loewi, Inc.

Plaintiff's Exhibit 16. Letter dated September 16, 1947, Hugo V. Loewi, Inc., to C. W. Paulus.

Plaintiff's Exhibit 17. Telegram, September 16, 1947, Hugo V. Loewi, Inc., to C. W. Paulus.

Plaintiff's Exhibit 18. Copy of telegram dated September 17, 1947, C. W. Paulus to Hugo V. Loewi, Inc.

Plaintiff's Exhibit 19. Photostat copy of telegram, September 17, 1947, C. W. Paulus to Hugo V. Loewi, Inc.

Plaintiff's Exhibit 20. Letter dated September 18, 1947, Hugo V. Loewi, to C. W. Paulus.

Plaintiff's Exhibit 21. Telegram, September 18, 1947, Hugo V. Loewi, Inc., to C. W. Paulus.

Plaintiff's Exhibit 22. Carbon copy of letter dated September 20, 1947, C. W. Paulus to Hugo V. Loewi, Inc.

Plaintiff's Exhibit 23. Hop Sample Advice, September 20, 1947.

Plaintiff's Exhibit 24. Letter dated September 22, 1947, Hugo V. Loewi, Inc., to C. W. Paulus.

Plaintiff's Exhibit 25. Letter dated September 26, 1947, D. E. Bullis, Chemist, Agricultural Experiment Station, [4] Oregon State College, to C. W. Paulus, giving analysis of hop samples.

Plaintiff's Exhibit 26. Telegram dated September 30, 1947, Hugo V. Loewi, Inc., to C. W. Paulus.

Plaintiff's Exhibit 27. Letter dated September 30, 1947, Hugo V. Loewi, Inc., to C. W. Paulus.

Plaintiff's Exhibit 28. Telegram dated October 16, 1947, Hugo V. Loewi, Inc., to C. W. Paulus.

Plaintiff's Exhibit 29. Letter dated October 16, 1947, Hugo V. Loewi, Inc., to C. W. Paulus.

Plaintiff's Exhibit 30. Telegram dated October 22, 1947, Hugo V. Loewi, Inc., to C. W. Paulus.

Plaintiff's Exhibit 31. Copy of telegram dated October 22, 1947, C. W. Paulus to Hugo V. Loewi, Inc.

Plaintiff's Exhibit 32. Telegram dated October 23, 1947, Hugo V. Loewi, Inc., to C. W. Paulus.

Plaintiff's Exhibit 33-A. Hop Inspection Certificate dated August 27, 1947.

Plaintiff's Exhibit 33-B. Weight Slip, 59 bales Kilian W. Smith hops.

Plaintiff's Exhibit 33-C. Hop Purchase Invoice dated October 25, 1947.

Plaintiff's Exhibit 34. Letter dated October 23, 1947, Hugo V. Loewi, Inc., to C. W. Paulus.

Defendant's Exhibit 35. Hop Samples.

Defendant's Exhibit 36. Letter dated January 15, 1948, D. E. Bullis, Chemist, Agricultural Experiment Station, Oregon State College, to Kilian W. Smith, analysis of [5] hop samples.

Defendant's Exhibit 37. Letter dated January 30, 1948, D. E. Bullis, Chemist, Agricultural Experiment Station, Oregon State College, to Kilian W. Smith, analysis of hop samples.

Defendant's Exhibit 38. Letter dated April 15, 1948, Hugo V. Loewi, Inc., by C. W. Paulus, to Kilian W. Smith.

Defendant's Exhibit 39. Carbon copy of letter dated March 15, 1948, Maguire, Shields, Morrison & Bailey to J. B. Henshaw, Oregon Electric Railway Company.

Defendant's Exhibit 40. Carbon copy of letter dated March, 1948, Hugo V. Loewi, Inc., to Kilian W. Smith.

Defendant's Exhibit 41. Letter dated November 12, 1947, J. B. Henshaw, Agent, Oregon Electric Railway, to Kilian W. Smith.

Defendant's Exhibit 42. Mimeograph circular, United States Hop Growers' Association, August 23, 1947.

Defendant's Exhibit 43. Hop Sample Advice, September 10, 1947 (original).

Defendant's Exhibit 44. Telegram dated October 1, 1947, Hugo V. Loewi, Inc., to C. W. Paulus.

Defendant's Exhibit 45. Telegram dated September 25, 1947, Hugo V. Loewi, Inc., to C. W. Paulus.

Defendant's Exhibit 45-A. Hop Sample Advice, September 10, 1947 (original). [6]

Defendant's Exhibit 46. Hop Sample Advice, September 20, 1947 (original).

Defendant's Exhibit 47. Hop Sample Advice, October 4, 1947 (original).

Defendant's Exhibit 48. Letter dated September 25, 1947, Hugo V. Loewi, Inc., to C. W. Paulus.

Defendant's Exhibit 49. Letter dated October 22, 1947, Hugo V. Loewi, Inc., to C. W. Paulus.

Defendant's Exhibit 50. Carbon copy of letter dated October 27, 1947, C. W. Paulus to Hugo V. Loewi, Inc.

Defendant's Exhibit 51. Letter dated October 29, 1947, Hugo V. Loewi, Inc., to C. W. Paulus.

Defendant's Exhibit 52-A to 52-E. Five original tenth-bale inspection samples taken from Lot 64 of Kilian Smith 1947 crop clusters.

Defendant's Exhibit 53-A to 53-G. Seven samples, splits of tenth-bale samples taken from Kilian Smith crop upon inspection.

Defendant's Exhibit 54-A to 54-G. Seven original type samples taken from Kilian Smith lot prior to inspection of later samples.

Defendant's Exhibit 55-A-to 55-F. Six inspection samples of Kilian Smith Fuggle Lot No. 14.

Defendant's Exhibit 56. One type sample of Kilian Smith fuggle lot.

Defendant's Exhibit 57-A to 57-E. Hop samples.

KILIAN W. SMITH

the Plaintiff herein, was thereupon produced as a witness in his own behalf and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kester:

Q. State your name, please.

A. Kilian W. Smith.

Q. You are the plaintiff in the case here, No. 4083, is that right? A. Yes, sir.

Q. Where do you live, Mr. Smith?

A. Live two and a half miles south—or north-west of Donald.

Q. Where is that with respect to other locations? Is that in the Willamette Valley?

A. Yes, the northern corner.

Q. Do you have a hop ranch there?

A. Yes.

Q. Are you engaged in any other business besides raising hops?

(Testimony of Kilian W. Smith.)

A. At present, also engaged in the retail farm implement business.

Q. Where is that location?

A. In Woodburn.

Q. State your experience in dealing with hops, growing them, or whatever you have had to do with hops.

A. Several years ago,—I think in 1935,—we seeded a hopyard on some rented land, and I operated that same property for three [8] years, and after that time I helped my father in the furniture business. Then, again in 1943, I purchased a hop ranch of my own and I still live there and operate that.

Q. Since 1943 have you been continuously in the business of raising hops? A. Yes.

Q. Have you engaged at any time in buying and selling hops? A. Yes.

Q. State your experience in that connection.

A. I worked for the J. W. Seavey Hop Company as a buyer and field man; helped inspect hops. Started with them in the fall of 1943, I think, during 1943, 1944, 1945 and 1946.

Q. As commission man for J. W. Seavey, how did you operate, in a general manner?

A. I had orders to buy spot hops and make contracts, term contracts, and I had the north end of the valley here.

Q. In that connection did you examine various crops of hops, take samples, and inspect the samples and inspect the bales and do things of that sort?

(Testimony of Kilian W. Smith.)

A. Yes.

Q. Did Mr. Seavey, or the Seavey Company, buy and sell hops on the basis of the inspections that you had made? A. Yes.

Q. Have you had experience generally in determining the quality and condition of hops? [9]

A. Yes, some.

Q. In the course of your experience in growing hops, have you had experience in selling your own crop that you have grown there?

A. You mean to dealers?

Q. To dealers or otherwise, whatever it has been. A. Yes.

Q. What has been your experience with your own crop on the place that you are now? Have you been contracting or have you——

A. I usually try to contract them, to contract half of my crop, and sell the other half on the open market.

Q. Did you make a practice of contracting early in the season or late in the season, or was there any particular rule on that?

A. Well, during the war years I contracted at the OPA ceiling price. I had a term contract of five years.

Q. So that takes care of the early years of your ranch experience? A. Yes.

Q. What sized ranch do you have?

A. I have 127 acres.

(Testimony of Kilian W. Smith.)

The Court: What was the wartime price, the ceiling price?

Q. (By Mr. Kester): Would you state, Mr. Smith?

A. It was 64 cents a pound based on eight-per cent pick, and over six per cent seeds there was a premium of one cent a pound.

The Court: 64 cents base.

The Witness: 64, yes. [10]

Q. (By Mr. Kester): Were contracts during the war and during the OPA regime made on a sliding scale, similar to these open-end contracts, as far as premiums and discounts were concerned?

A. Well, yes. It is the same. Some of the first ones of the lot——

The Court: You don't need to go into detail. There were premiums and discounts?

The Witness: Yes, and there was a stipulated floor price.

Q. (By Mr. Kester): Did they permit the use of the grower's market price at all?

A. If it was above ceiling price. If the ceiling was raised, the grower was entitled to any raise.

Q. On your ranch how many acres of hops have you had in recent years?

A. When I first moved out to the ranch, there was 22½ acres in fuggle hops and two years later I cleaned up a new piece of ground and set out another seven and a half acres of late clusters.

Q. At the present time is that the size of your hop acreage? A. Yes.

(Testimony of Kilian W. Smith.)

Q. What has been your experience, as far as production on the place in number of bales is concerned? Do you recall?

A. It is an average of seven bales to the acre.

Q. Of both fuggles and clusters? A. Yes.

Q. Referring now to the 1947 season and the 1947 crop, state in [11] a general way what cultivation measures you took during the growing season in 1947?

A. Well, we cultivated as often as necessary. We tried to keep the ground in good condition, free of weeds, and tried to hold our moisture well, and of course we had fertilized early at plowing time, and we were very particular in cultivating this hopyard.

Q. Did you irrigate either the fuggles or clusters? A. Not in 1947.

Q. Did you do anything by way of dusting or spraying or things like that?

A. Oh, yes, regularly, once a week in the clusters.

Q. How about the fuggles?

A. Yes, we dusted for lice.

Q. Did you take the usual and customary procedures for the control of insects and diseases in your yard? A. Yes.

Q. Is that in accordance with the usual farm practice in that vicinity? A. Yes.

Q. How did you pick your hops? Did you use machine-picking or hand-picking?

(Testimony of Kilian W. Smith.)

A. I hand-picked up until the 1948 crop.

Q. The 1947 crop, then, was hand-picked?

A. Yes. [12]

Q. State what your experience was with picking in 1947.

A. In the early part of the season the picking situation was generally pretty bad, due to the fact that some of the fuggles crop matured very early. There was one crop down there that was picked on the 4th of July. We picked from the 4th of July until the middle of or towards the end of August. They had six or eight weeks there of picking time because the different crops matured at varying times.

Then, of course, when we went into the late hops—Most of the growers had more acreage of late clusters, and picking started with us about the same time; within a week, why, most of the yards were starting to pick and then pickers became scarce. They moved to the various yards, and it was a difficult job to keep a crew.

Q. What did you have to do in order to keep a crew of pickers?

A. Just had to nurse them.

Q. Where did you get your pickers, for instance?

A. We used a certain amount of local people, and I ran a truck from Newberg and one from Oregon City and then, later in the cluster season, I got hold of a Negro crew from Vanport.

(Testimony of Kilian W. Smith.)

Q. Was there much transient labor that season to help in picking?

A. Yes; not a whole lot that were transient, but they moved from one yard to the other.

Q. What was the picking price in 1947? What did you pay pickers?

A. In the early fuggles we started out at three and a half cents [13] and the lates, we started at three and a half cents, but were later forced to go higher. In one case I had to go to five cents and also pay 50 cents per head to get this Negro crew, and also there was other supervisory and transportation expense.

Q. Are you able to state approximately what your cost of production was in 1947, or have you any figures of that sort?

A. I do not have any figures. I could give a general estimate.

Q. Approximately what, in your judgment, would your cost of production be per bale?

A. I would say, approximately, on the fuggles they ran around 45 cents.

Q. Is that per pound or per bale?

A. Per pound; maybe 50 cents, somewheres in there.

Q. 45 or 50 cents a pound?

A. Yes, and the late clusters, due to higher picking costs, it ran probably 10 or 15 cents a pound higher.

(Testimony of Kilian W. Smith.)

Q. What was your experience in 1947, with respect to mildew? Did you have some in your yard?

A. Yes.

Q. How would you characterize the extent of the mildew in your yard?

A. Well, I looked at a number of yards throughout the valley and I considered the extent of mildew in mine was less than most yards.

Q. About when did the mildew first appear in your yard? [14]

A. About the 1st of August or the latter part of July.

Q. Was there mildew in the fuggles as well as in the clusters?

A. There might have been a very slight touch.

Q. Generally speaking, fuggles are more resistant to mildew, are they? A. Yes.

Q. From that time on what was your experience with mildew in the yard? Did you have it under control, or did it get worse, or did it get better, or what was the situation?

A. Well, we had it under control until it hit the hops after they were—after they had formed.

Q. Did some mildew hit the hops after they formed? A. Yes.

Q. How would you characterize the extent of the mildew? Little or much?

A. Well, it hit the hops while they were maturing and it discolored them; they showed spots from mildew.

(Testimony of Kilian W. Smith.)

Q. Could you tell us approximately what your picking dates were for both fuggles and clusters?

A. I think we started about the 10th of August on the fuggles and finished about the 18th, and then we laid off for about a week and started in the lates about the 25th of August and finished on them around the 3rd of September.

Q. In that picking did you make any attempt to eliminate or avoid those vines which were particularly severely hit by mildew? [15]

A. Yes.

Q. What did you do and how were you able to do that? Would you describe what your procedure was?

A. The pickers themselves more or less took care of that. In other words, if there were a lot of small hops, undeveloped hops or nubbins, as they were called, on a vine, the picker would naturally pass them up because it would not make any weight in his basket.

However, there were hops with good clusters on, long strippers, and there might have been a few mildewed hops along with them that naturally went into the basket, but, in general, the heaviest branches, the heaviest infested branches, were passed up, and we estimate that they left about 25 percent of the hops on the vines. There were some on all the vines that they left.

Q. Before picking, did you make any estimate of what your probable production would be?

(Testimony of Kilian W. Smith.)

A. At the time we started picking, I estimated we would have 200 bales.

Q. What, in fact, did you get, Mr. Smith?

A. Seventy-three.

Q. Was that on your fuggles or clusters?

A. Clusters.

Q. Did you make any estimate or is it possible to estimate approximately the extent to which the yards were hit by mildew? [16] Is it possible to make any judgment of percentage or amount, or anything like that?

A. Well, it would be pretty hard to estimate it exactly. All we could do is from comparisons with other yards, and in my yard I would say that possibly 50 per cent of the hops had some—had been hit by mildew at some stage or another, in their growth or their development.

Q. The other 50 per cent, then, would not be picked, is that it? A. Yes.

Q. Are you able to estimate now the amount of those that were affected by mildew that were left in the yard, as you have described?

A. Well, those that were left, the greatest portion were those infected hops.

Q. Have you any way of estimating the percentage that would be of the total, affected by mildew?

A. Again, I would have to guess. It would probably be around—those that were left, they were the ones that were mildewed.

Q. Yes. You had a contract here, of course,

(Testimony of Kilian W. Smith.)

with Hugo V. Loewi, Inc., for both your fuggles and your clusters, is that correct?

A. Well, I had a prior contract, a 100-bale contract, with Mr. Seavey for 100 bales on the fuggles. He was to receive the first 100 bales and we raised 159 bales of fuggles, so we contracted the balance of the fuggles and the entire late crop to Hugo V. Loewi, Inc. [17] .

Q. Would you relate the circumstances under which the contract between yourself and Hugo V. Loewi, Inc., was entered into? How did it happen?

A. Mr. Fry came out to visit me about the middle of August and inquired whether I was still connected with the Seavey Hop Company. I told him that I had left the Seavey Company in the spring and was no longer connected with them, and he wanted to know if my hops were open, then. I told him yes, they were, that anybody could buy them.

Q. What happened? Was there any further conversation?

A. Then he stated that he might be able to secure me an 80-cent floor contract, and wanted to know whether I would be interested in it or not, and I stated I would definitely sell the extra fuggles and the entire lot—the entire late crop, and he said at that time he was primarily interested in fuggles—it was the early stage of the game—and, so, I told him if he wanted to—I wanted to sell the whole bunch together. So he went back to his office and

(Testimony of Kilian W. Smith.)

he saw him on several different occasions, but he came back on a different date, a later date, and said that they could take the whole crop.

Q. On any of these visits did he go out and look at the hopyard?

A. Yes. On his first visit, why, he—I told him my cluster hops were mildewed and told him all he wanted to know—I told him I wanted to know that before he talked to his boss about contracting them for me. He told me he had been around the [18] valley the last few days with his buyers and he said he knew there was mildew in the valley. I said, “You had better look at mine and see how bad they are and see if you really want to buy them,” because in my experience in buying hops I would like to know what the crop looked like, especially at that time, because they were ready for harvesting.

He was a bit reluctant to go back and look at the crop but he finally did go back, and we walked through the whole yard, and I asked him how it compared with these other yards that he had seen through the valley and he said that some yards were much worse and some were better—I mean in better condition as far as mildew infection was concerned.

I told him I wanted to be sure and let his boss know what they were like before he contracted them, so at a later date he came and signed me up on a sales slip.

Q. Did he ask you; or, rather, I mean, did you

(Testimony of Kilian W. Smith.)

ask him at the time of his first visit about whether or not they would be acceptable hops for them to buy?

A. He said they needed hops, and he didn't see how they could buy hops that were not mildewed because most of them in the valley were mildewed.

Q. Did he state whether or not he had instructions to buy all the hops he could get his hands on or something like that?

A. Yes. He said he wasn't very busy; in fact, he wanted to know whether I knew of any other lots that were open. [19]

Q. At that time you say you went through the yard. Was that just the cluster yard or were fuggles still being picked?

A. We were still picking a few fuggles; we were winding up on the fuggles, and we had to walk through the fuggle yard, or drive, to get to the late cluster yard. The late cluster yard lies directly behind the fuggle yard.

Q. Did he see the fuggles being picked, as well as the clusters, do you know?

A. Oh, he must have.

Q. Did you discuss with him at that time what the probable production would be?

A. I told him it was very difficult to judge it exactly, and we could make a conservative estimate of 50 bales.

Q. You say he came out again and—at a later time? A. Yes.

(Testimony of Kilian W. Smith.)

Q. What happened? Do you know about when that was, approximately?

A. I think it was about the time we were finishing the fuggles. It must have been around the 18th or 19th of August.

Q. To refresh your recollection, the sales slip which is marked here is dated August 19th. Was it prior to that time?

A. Well, he had made about three or four trips out to see me. I was inquiring from other buyers what the market price was, and I did not stipulate I was going to sell immediately on his prior visits.

Q. I hand you Defendant's Exhibit No. 2, which has been marked [20] here, the sales slip dated August 19, 1947. Will you state the circumstances under which that was signed?

A. Well, it says here: "For \$1 received, I hereby sell to C. W. Paulus entire crop estimated at 50 bales of lates of prime hops like sample received, own growth, crop 1947, at 81 cents floor or market until October 31st, cents per pound, premium and discount."

Q. Will you tell us how you happened to sign that? What approximate date was it when he brought it out? Tell us all about it.

A. Mr. Fry brought this out after he had talked with his boss, and he wanted me to execute it. He wanted to tie me up on a sales slip. We stood right in the yard, and on previous days he stipulated that there was an 80-cent floor, and on this day he

(Testimony of Kilian W. Smith.)

came out he said, "I will give you the advantage of another cent. The market has gone up a cent since last night," so that is the reason it happened to be 81.

Q. Do you know about what time of day that occurred? A. I think it was in the morning.

Q. Did he at that time go out and look at the yard again, or was there any discussion about your yard?

A. No, he looked at the yard prior to the signing of this.

Q. When he brought this out, he did not look at it again at that time? A. No.

Q. That refers only to the lates, does it? [21]

A. Yes.

Q. Was there a similar slip signed for your fuggles? A. There must have been.

Mr. Kester: I don't think that has been produced here. Will it be stipulated that there was a similar sales slip for the fuggles?

Mr. Kerr: Yes.

Q. (By Mr. Kester): The fuggles deal was only for the excess over the Seavey contract, is that right?

A. These hops were picked at that time. They were not baled yet.

Q. I hand you Exhibit No. 1, which is the contract, and ask you if that is the cluster contract signed on the day following this sales slip? You can look at the back of it and see your signature on there. A. Yes.

(Testimony of Kilian W. Smith.)

Q. What were the circumstances under which that contract was signed? Who brought that out?

A. Mr. Byers brought this out the following day.

Q. Is he an employee of C. W. Paulus likewise?

A. Yes.

Q. What was the conversation at the time he brought the contract out to be signed?

A. Oh, we didn't have much conversation. It seems to me that I was gone to the hop warehouse at the time and I came back and [22] he was sitting in his car in the yard, and he handed me that contract to sign and also a check for \$3500 advanced on the fuggle crop.

Q. He had a contract for the fuggles as well as for the clusters? A. Yes.

Mr. Kester: I don't think the fuggles contract has been produced, but I think we can stipulate that there was a contract on the fuggles for the amount over the Seavey contract. Is that correct?

Mr. Kerr: It is so stipulated.

Q. (By Mr. Kester): Was it on the same price scale as your cluster contract? A. Yes.

Q. You say he gave you a check for \$3500 advanced on the fuggles?

A. Yes. The fuggles had been picked, and I told him that we would not be picking the late hops for possibly another week, and he told me to let them know when we started picking the late hops and they would send the advances out on them.

I told him I had the fuggles already picked, and

(Testimony of Kilian W. Smith.)

I would probably use this \$3500 to go ahead and pick the lates, so I might not need any more money.

Q. Did he indicate whether or not that was satisfactory? A. Yes.

Q. Your picking of the clusters began about the 25th, you say? [23] A. I think so.

Q. And lasted until about when?

A. To the 3rd of September.

Q. After this contract was signed, did Mr. Fry or Mr. Byers or Mr. Paulus, or anyone else representing Hugo V. Loewi, Inc., come out and look at your yard again, after the contract was signed?

A. We began picking the late hops and after the second or third day, why, some of my pickers began to scatter; they had made promises to other growers that they would pick when they started, so, then, of course, the growers were bidding for pickers and we had to raise the picking price, so I became a little bit leery. I hadn't called Paulus for any advances when we started, and I thought I had better call him and have him look at the yard again and I told him to bring his checkbook along.

Q. Did you talk to Paulus personally then?

A. I don't remember. I telephoned him. It might have been one of the men in the office. I don't remember exactly who it was.

Q. What message did you give to Paulus' office? State as accurately as possible what message you gave either Paulus or his office?

A. Well, I said we were in the process of pick-

(Testimony of Kilian W. Smith.)

ing the late hops now and I wanted him to come out and look at my yard again and to bring his checkbook along to furnish me the advances.

(The Court then proceeded to the transaction of other business.)

Q. (By Mr. Kester): Pursuant to that conversation, what happened next?

A. Mr. Fry came out then about noon. We had been picking two or three days. The wires were down and the pickers were in the process of picking.

I asked him his advice on going ahead; at the present time there was no grower that was picking. We were talking about the picker situation.

I told him, "This picker situation is getting tough and we will have to go up to five cents a pound to pick them in order to hold the pickers," and he said he knew it was tough all over and he advised me——

Mr. Hill: If your Honor please, we would like to state an objection to any testimony, oral testimony, that varies the terms of the written contract, or tends to contradict the terms of the written contract, as being a violation of the parole evidence rule.

The Court: Admitted, subject to the objection.

Q. (By Mr. Kester): Lest there be any misunderstanding, I understand this conversation happened some week or two after the contract was

(Testimony of Kilian W. Smith.)

entered into, at the time when advances were made under the contract, is that correct?

A. That is right.

Q. Continue, and tell us what the conversation was. [25]

A. Well, I asked him how he liked the way we were picking and then he said, "Do the best you can. Pick them as clean as you can and be sure to get them dried properly," and I asked him to look at the baskets of the pickers, and he said, "Well, skip as many of the blighted ones as you possibly can."

Q. Did you discuss with him the amount of mildew in the yard?

A. No. We were discussing the size of the crop, that it would turn out a little heavier than we first anticipated. We had the wires down and you could see more clearly how many hops were there.

Q. Did you discuss with him the matter of leaving out some vines, the worst ones, and picking the rest?

A. Yes. He advised me to try and get the best ones.

Q. Did you discuss with him whether you might need further advances beyond the \$3,000 that he gave you then?

A. Well, I told him I thought I would have enough money with that but he says, "If you need more, why, call us up." He said, "If you have to

(Testimony of Kilian W. Smith.)

go higher and pay more than five cents a pound, you might need more money."

Q. Did you ask him whether or not you should continue picking the yard? A. Yes.

Q. What did he say?

A. He said, "Here is the money. If you want some more, call us."

Q. How did you arrive at the amount of money that was paid to [26] you at that time?

A. Well, he said he would probably have to go on the basis of the contract, stipulating 50 bales, and we estimated it would cost about 30 cents a pound just to pick them alone. 50 bales would be \$10,000, and that figured up at about \$3,000 at 30 cents a pound.

Q. Did you agree on that figure between yourselves?

A. Yes; in fact, the check did not have any amount filled in it. It was signed by, I think, Mr. Byers, and Mr. Fry filled in the amount, the \$3,000 amount.

Q. He had a blank check when he came out?

A. Yes; it was signed, however.

Q. If you know, was it made out payable to you, when he came out there? A. Yes.

Q. So, all he did was to fill in the amount when he got out there? A. That is right.

Q. What was the condition of the crop at that time with respect to mildew? Did it have more or less than it had when he saw it before?

(Testimony of Kilian W. Smith.)

A. Well, it was about the same, because he had looked at it probably a week or ten days earlier, and the hops were already formed; they were simply more mature.

Q. Do you know how many had been picked at that time? [27]

A. Well, we had one kiln picked up, I think, and they were up at the hop house at that time. I told him to stop up there and check on those and to give my drier instructions on how to dry them.

Q. Did he state at that time how, in his opinion, your crop compared with other crops in the vicinity?

A. He said some were better and some were worse.

Q. Did he discuss with you the quantity of the production; that is, whether it would be up to the amount that had been estimated or not?

A. Yes, we talked about that and he said, "It is hard to determine exactly until you are through picking."

Q. At that time I take it the fuggles had already been picked, dried and baled, at the time he was out there?

A. Yes.

Q. Do you know approximately when they were delivered to the warehouse?

A. I believe we delivered them a day or two before we started to pick the lates.

Q. Do you recall what the leaf and stem content of the fuggles was?

A. I don't think that certificate was produced here. It was seven per cent pick.

(Testimony of Kilian W. Smith.)

Q. Seven percent on the fuggles? A. Yes.

Q. Wait. Seven per cent on the clusters, according to the certificate here. Were your fuggles the same?

A. The fuggles were seven per cent and the late hops were nine per cent, as I remember it.

Q. 59 bales. That was the fuggles?

A. Yes.

Q. Pardon me. That is right. That is in evidence as Exhibit No. 33-A. Here is the other one. Exhibit No. 14 shows the leaf and stem content, nine per cent on 73 bales of clusters. That is correct?

A. Yes.

Q. About when were the clusters delivered to the warehouse, if you know?

A. I would judge about a week after they were picked, possibly about the 10th.

Q. Were you present at the time they were delivered to the warehouse?

A. I delivered them to the warehouse myself.

Q. Were samples taken of them by some representative of Hugo V. Loewi, Inc., when they were delivered to the warehouse?

A. I don't recall if they took them then or not.

Q. Did they subsequently get samples at the warehouse?

A. Yes. I saw them later and—saw the samples I think in Mr. Paulus' office later.

Q. Do you know approximately when prelimi-

(Testimony of Kilian W. Smith.)

nary samples were taken [29] from the lot at the warehouse? A. No, I don't know exactly.

Mr. Kester: Counsel has produced a hop sample sheet dated September 10th, showing a sample of 73 bales of cluster hops. May I ask Counsel if this was the first sample taken of the clusters, in order to fix the date?

Mr. Kerr: Yes. We will so stipulate.

Q. (By Mr. Kester): With that date as a reference point, if the clusters were delivered on or prior to the 10th of September, do you know about when it was you were present when samples were being taken? Was it subsequent to or was it about that time?

A. The only occasion of sampling that I can recall exactly now is the time when they took the tenth-bale inspection samples.

Q. You do not recall being present at any time when any other samples were taken?

A. I had thought Mr. Byers might have taken some samples when he was out there at one time. I had been gone downtown and came back and met him, but I didn't see anybody take any samples.

Q. What warehouse were those delivered to?

A. To the Oregon Electric warehouse in Salem.

Q. Was that a warehouse satisfactory to Hugo V. Loewi, Inc.? A. Yes.

Q. Did they ever raise any question about the place of delivery? A. No.

(Testimony of Kilian W. Smith.)

Q. They knew they had been delivered to that warehouse? [30] A. Yes.

Q. Under what circumstances did you select the grower's market price for the clusters, or for both fuggles and clusters?

A. Well, Mr. Byers came out to my farm one day. I wasn't home. He spoke to my wife. I happened to be in St. Paul at the time at the blacksmith shop.

My wife told him where I was, so he came over to St. Paul and I met him there, and he asked me if I wanted to settle under the contract—if I wanted to select my price. I asked him what it was and he said they were offering 85 cents for eight per cent clusters and 90 cents for eight per cent fuggles, so I told him I would discuss it with my wife and let him know.

Q. Then did you subsequently talk to him or to someone representing Hugo V. Loewi, Inc.?

A. I believe I called Mr. Paulus' office and told him that I was willing to accept that price.

Q. Do you know whom you talked to there?

A. I believe it was Mr. Paulus.

Q. Did he indicate what would be necessary in order to effect the selection of the prices?

A. I think he told me to drop up to the office, which I did, a day or so later, and he said I would have to furnish a letter accepting my price that I selected, my grower's market price.

I told him I did not have any letter with me but

(Testimony of Kilian W. Smith.)

if he had some form—Mr. Byers had forms prior to this time when [31] he came out, offering to settle, so I suggested they could copy the form and he did there in the office, and I signed it.

Q. Will you look at Exhibits No. 4 and No. 6 and tell me if those are the forms which you signed there at that time? A. Yes.

Q. Did Mr. Paulus indicate whether or not your price selection was satisfactory?

A. He said it was what the market was, yes.

Q. Do you know if that was the market price?

A. Yes.

Q. Did he raise any question at that time about your selection of the grower's market price?

A. He just said he would submit it to Mr. Loewi.

Q. Then at that time did you have any discussion with Mr. Paulus about your crop?

A. Oh, yes. Of course, we were discussing crop conditions in general and we were—I was inquiring of him as to the total crop, whether he had heard what the total crop was going to turn out, and he said he didn't know at the time, and of course the hop men and a lot of the hop growers were estimating what the crop might turn out to be, because there was a lot of different guesses due to this mildew, and some of the people estimated it as low as forty to fifty thousand bales in the valley, and of course the estimates ranged from there on upwards, and at the same time it seemed that some of the buyers had these low [32] estimates and they

(Testimony of Kilian W. Smith.)

were out here, some of them were out here during the season, and they figured the mildew damage was going to cut down the crops quite a little.

In fact, Mr. Paulus stated that his principal, Mr. Oppenheim, had been out inspecting several hop-yards in the valley that were blighted or mildewed, and that he made an estimate of around fifty to fifty-five thousand bales, and even offered bets, and one of them said he couldn't quite agree with Mr. Paulus; he figured there would be a few more. We discussed this high market and I asked him if the market had not gotten up to this high point on the basis of some of these guesses as to what the crop might turn out to be, and he thought that might be a factor.

Q. Did he indicate whether Hugo V. Loewi had given him any instructions to get all the hops he could?

A. Well, he said so at that time, and they were going to buy as many good hops as possible.

Q. Did he at that time discuss your crops with other crops?

A. Yes. I believe that he took down the sample that he had in the office and we looked at that. We also looked at other samples.

Q. Was there any comment made at that time relative to your samples as against other samples there?

A. Well, they showed more mildew damage and, for my own information, I asked him to show me

(Testimony of Kilian W. Smith.)

samples of other crops. He did that very obligingly. He took down samples from his racks and we [33] looked at other crop samples. We looked at some samples that showed less mildew damage than mine and we looked at some samples which showed a great deal more.

Q. Did Mr. Paulus make any comment about how your samples compared with the general average of hops raised in the valley that year?

A. Just in general terms.

Q. What was the gist or substance of the remark?

A. Well, he said it was obvious that they had some mildew; it was obvious, also, there were some better ones and some much worse.

Q. Did you ever have a sample of these hops chemically analyzed?

Mr. Kerr: May the record show, your Honor, that we object to any evidence concerning chemical analyses of hops on the ground there is nothing in the contract specifications referring to chemical analyses or the chemical content of the hops and so on and we therefore suggest that such testimony is wholly irrelevant.

The Court: What do you want to put it in for?

Mr. Kester: There will be evidence—in fact, the chemist was supposed to be here at 1:00 o'clock but I have not seen him yet, the man who made some analyses, who will testify with respect to the brewing qualities of these particular hops. I think there

(Testimony of Kilian W. Smith.)

will be evidence to show that in the trade that is of some value with respect to the quality of the hops, that it has been so recognized at least for a great many years. [34]

Mr. Kerr: We would have no objection to that, ordinarily, but, frankly, it would require us to go into an entirely collateral and independent issue, and require us to explore the chemistry of the hop, the brewing value of hops. What makes a hop of value in beer is indeed a complex and a large subject. We are prepared, if the Court so desires, to bring in brewmasters and brewers and others to testify on this subject, but we believe it is wholly irrelevant.

The Court: I will reject it until I hear the defendant's case, Mr. Kester.

Mr. Kester: May I make this remark, with respect to that, your Honor? It comes certainly as no surprise because the defendant itself had the hops analyzed. They have well known what the analysis was and what was claimed for it. If the Court is interested in it——

The Court: No, I don't want to hear it. I just want to hear from the defendant first.

Q. (By Mr. Kester): Did you submit a sample of them for chemical analysis? A. Yes.

Q. To whom did you submit it?

A. Submitted it to Mr. D. E. Bullis of the Oregon State College.

Q. Did you submit more than one sample?

(Testimony of Kilian W. Smith.)

A. Yes, I took five split samples to get a representative analysis of the entire lot. [35]

Q. Did you take samples on more than one occasion? A. No.

Q. You did not take him samples on more than one occasion? A. No.

Mr. Kester: In view of your Honor's ruling, I was expecting to call Mr. Bullis in our case in chief. We made arrangements for him to come up from Corvallis today.

The Court: Call another witness now.

Mr. Kester: I am not through with this witness yet.

Q. Do you know about when these hops were weighed in, the clusters?

A. I believe it was the latter part of—

Q. I will refresh your recollection with Plaintiff's Exhibit No. 13 which is the weight slip for seventy-three bales, with your name, dated October 3rd, and ask you if that is the date on which they were weighed in?

A. Yes, it must be. It says "October 3rd" here.

Q. Prior to weighing them in, did representatives of Hugo V. Loewi, Inc., require you to sign some agreement with respect to weighing them in?

A. Yes, he had me sign a letter, that he had prepared. I don't remember the exact wording of it.

Q. Is that Exhibit No. 5 which is being handed to you? In that respect, I will ask you whether or

(Testimony of Kilian W. Smith.)

not he stated whether or not he would weigh them in without such a letter? [36]

A. He said they were instructed to get a signature on this letter before they could even touch the hops.

Q. Then you did sign it, and they were weighed in on the 3rd of October, I take it? A. Yes.

Q. Were you present during the weighing-in?

A. Yes.

Q. Were samples taken and inspections made in the usual manner? A. Yes.

Q. Will you describe briefly what was done at that time?

A. Mr. Fry punched them and he got his handful of tryings and sampled every tenth bale, and at that time we ran across two bales that were—they had excessive moisture in them, and he told me to take them home and put some more heat under them and dry them out a little better and to bring them back again, and that he would not pass on them until I returned them; so I took them home and dried them out a little more and brought them back and he re-tried those and passed on them.

Q. At that time was any statement made with respect to the quality or condition of the hops?

A. He said at that time that he could not take them in until he had an okeh from back East.

Q. In other words, that they were neither being accepted or rejected at that time?

A. That is right. [37]

(Testimony of Kilian W. Smith.)

Q. Did you subsequently receive a letter from Mr. Paulus, which I now hand you, Exhibit No. 3, dated October 16th, wherein they rejected those clusters? A. Yes, I received this.

Q. Did you have any discussion with Mr. Paulus wherein he discussed with you specific grounds upon which they were rejecting hops?

A. Well, on one of my visits to his office—I was after him to have these hops weighed in and I wanted to get paid for them. He stated that Mr. Loewi did not like the hops and I said, “Well, he should have known what they were when he bought them,” and he said, “Well, I have to go on what Mr. Loewi said,” so we had a general conversation along that line.

Q. Did he state specifically what reason Loewi had given for rejecting the hops?

A. Well, I was there on a couple of different occasions, and I think finally he showed me a letter that he got from Mr. Loewi, and it stated that the hops were dirty-picked and badly baled.

Q. Did he ever raise any objection to any other feature of the hops besides “dirty-picking” and “badly baled”?

A. Well, only in this letter he said that the 1947 crop did not meet the requirements of the contract as to grade, quality, character and condition and, therefore, cannot be accepted.

Q. He mentioned specifically dirty-picking and badly baled and so on. Did he have any comment

(Testimony of Kilian W. Smith.)

to make—did he ever mention [38] anything else specifically besides those two things?

A. Mainly that Mr. Loewi did not like the hops.

Q. What about the first 100 bales that you had on contract with Seavey? What happened to those?

A. Well, I offered to settle with Mr. Seavey—I had an open-end contract with him, too, and I selected 90 cents as a basis for settlement. Of course, Mr. Seavey hadn't these hops sold yet and he tried to put me off. I had given him a written letter that I was selecting that price and he kept putting me off, so finally I told him I had better weigh them out so Paulus can get his 59 bales and he said they would do that, and he was just stringing along. He was our former boss and we always had friendly relations, so I trusted him to do that, so he did that. He sent Mr. Hinckle down to inspect them and he went through 110 bales of them and he set out ten of these bales and said he thought they were a little boardy or probably contained a little too much moisture.

A few days after that, or, I think, the next day, Mr. Byers from Paulus' office came down to the warehouse to weigh in these 59 bales, and he did not even comment on the fact that 10 bales may have contained some extra moisture. He took the whole works without any question.

Q. You say he took the whole works. Did they weigh in your fuggles, the 50 bales of fuggles over

(Testimony of Kilian W. Smith.)

and above the Seavey contract? Did Paulus accept those for Loewi? [39] A. Yes.

Q. State whether or not you have ever been paid for the fuggles which they accepted under the fuggles contract?

A. Well, they gave me a check for them after they went through the lates, but they deducted the advances that they had made me on the late crop.

Q. I will hand you Exhibit No. 9 and ask you if that is the check which they gave you with respect to the fuggles contract?

A. This is dated October 25th and made out in my name, in the sum of \$3,497.26, and it says, "Balance on contract delivery 59 bales fuggles," and signed by James A. Byers.

Q. Would you hold the check for a moment and take a look at Exhibit 33-C, the hop purchase invoice, and tell us how that amount was arrived at, apparently arrived at, the amount of that check?

A. This is a hop purchase invoice, dated October 25th. Name: Kilian W. Smith; hops delivered at Oregon Electric Warehouse, Salem; 59 bales gross weight, 11,281 pounds; net without burlap, 10,986 pounds. Grade analysis: Leaf and stem, seven percent; seeds over six percent.

10,986 pounds at 91 cents per pound, \$9,997.26.

Less advances, \$6,500; net settlement, \$3,497.26.

Q. When that computation was made, "Less advances to grower, \$6,500," did that include both the advances on fuggles and the advances on clusters?

(Testimony of Kilian W. Smith.)

A. Yes, that included the \$3,000 advanced on clusters and \$3,500 advanced on the fuggles.

Q. Did you ever cash that check that was handed to you?

A. No. I took it over to the bank and talked to my banker and I told him I was not satisfied with the deal that I had gotten and he advised me, he says, "Don't be a fool. Don't endorse it."

He said, "I would see an attorney, if I were you," and he selected several names and finally I went up to get in touch with Mr. Shields.

Q. Was that check returned to Paulus?

A. Yes, Mr. Shields returned it.

Q. Would you state the circumstances under which some representative of Hugo V. Loewi, Inc., first handed you that check?

A. That was after we had weighed in the fuggle hops. We went up to Mr. Paulus' office and Mr. Byers prepared these and handed them over to me there in the office.

Q. Was there any discussion as to whether or not you agreed to their deducting the cluster advances from the fuggles price?

A. Mr. Paulus was out at that time and Mr. Byers said that was all he had authority to do. I said, "Well, I don't like it," but I took it.

Q. Getting back to the time that the clusters had been weighed in, you mentioned that they took tryings of each bale; did that in the usual manner and took tenth-bale samples? [41]

A. Yes.

(Testimony of Kilian W. Smith.)

Q. And weighed them in? A. Yes.

Q. Did they put the usual marking, the number of the lot?

A. They numbered them from 1 to 73.

Q. That was Mr. Paulus' numbering, was it?

A. Yes. Were you speaking of the fuggles or lates?

Q. Talking about the clusters.

A. Yes. That was 1 to 73.

Q. Did they also have the state inspection number on the bales? A. Yes.

Q. Did they have the grower's number?

A. Yes.

Q. Did they have the warehouse number, or did you notice?

A. I don't recall. I think the warehouse goes by the grower's number.

Q. Did you have any discussion subsequently with respect to the warehouse receipt for the fuggles crop? Do you recall that transaction?

A. The warehouse receipt?

Q. Yes. Do you recall the warehouse making a demand on you for delivery of that receipt? Maybe you would not recall that. It was probably handled by an attorney.

A. Yes, I think I did get a letter from them. There was something about the receipt was not turned in. I think Mr. Seavey [42] or Mr. Paulus had not asked me for the warehouse receipt, and

(Testimony of Kilian W. Smith.)

that is usually turned back to the warehouse, so they wrote me and asked me for them.

Q. I think the correspondence will speak for itself. It is in evidence. Have these clusters ever been resold? A. No.

Q. Where are they at present, at the present time?

A. In the Oregon Electric Warehouse at Salem.

Q. Have they been there ever since they were delivered, subsequent to the baling? A. Yes.

Q. Have you ever been paid for the cluster crop at all? A. No.

Q. Did you recently obtain samples of these cluster hops from the Oregon Electric Warehouse?

A. Yes. On advice from you fellows, I went down there Tuesday night and took tenth-bale samples from Bales 10, 20, and so on, right next to where they had been punched before, and took them right next to the spot where they had taken their inspection samples.

Q. So that these samples were taken out of the same bales that Paulus had taken his inspection samples?

A. The same bale and the same place.

Q. Are these the samples you brought into the courtroom here? A. Yes. [43]

Q. Are those marked with the bale number corresponding to the bale they came out of?

A. Yes.

(Testimony of Kilian W. Smith.)

Q. In your opinion, would you say that your 1947 crop of cluster hops was of merchantable quality? A. Yes.

Q. How did they compare with the average of the 1947 cluster hops grown in the Willamette Valley?

A. Well, they were better than average in lupulin content, the brewing value that was in them.

Q. Would you say that the mildew that appears on them was of such character that it affected the lupulin inside the cone? A. No.

Q. What is your understanding of the meaning of the term "prime quality" in the hop business, in the hop trade generally?

A. To my understanding it means prime grade for the year that the hop was grown; that is, average of the crop for the crop year.

Q. Would you say that is the meaning of the definition, that a prime hop has to be merchantable quality? A. Yes.

Q. Are you prepared to state that a prime hop is a merchantable hop for the year grown?

A. Yes.

Q. Is that the meaning in the hop trade generally, as far as [44] you are aware?

A. Well, I didn't do any selling to the brewers or to the trade. I was mostly an inspector and buyer for Mr. Seavey. During the war years there wasn't much question about it. I bought some hops that,

(Testimony of Kilian W. Smith.)

personally, I thought were junk, trash, but they went at the full market price.

Q. How did your hops, the 1947 cluster crop, compare with hops that had been taken under similar contracts in prior years?

A. Well, I felt that they were equal to or better than a good many I had taken in.

Q. What has been your experience in the hop business during the time you have been familiar with it with respect to whether or not hop quality is of any great importance at a time when hops are in short supply?

A. Usually when hops are in short supply the price is high, and quality does not enter into it. As prices go down, they usually find some basis for rejection.

Mr. Kester: I think you may inquire.

Cross-Examination

By Mr. Kerr:

Q. I note in the contract for clusters, Defendant's Exhibit No. 1, the acreage is specified to be ten acres?

A. Yes.

Q. How do you account for the discrepancy between that ten acres and your statement on the witness stand that you had seven and a [45] half acres?

A. The hops are planted on a ten-acre field, and I will grant you actually there is seven and a half acres. In other words, it is an irregular field, and

(Testimony of Kilian W. Smith.)

there is turning ground that we allow on the outside of the plantings themselves, so it is actually a ten-acre field and contains seven and half acres of hops.

Mr. Kester: Is there any issue raised as to whether or not the contract was complied with in that respect? There has been no issue up to this time, and I would like to know whether there is any contention made on that.

Mr. Kerr: It depends on what the facts are; the same estimate of production on ten acres and on seven and a half acres, and we would like to know which is the fact.

The Witness: I think the sales slip will show seven and one-half acres.

Q. (By Mr. Kerr): So that seven and a half acres was the whole amount of clusters?

A. Yes.

Q. You refer to an average of seven and one-half or seven bales per acre of cluster production, is that right? A. Yes.

Q. That was over how many years?

A. Three years.

Q. What did your 1947 crop of clusters turn out on a per-acre [46] basis?

A. We picked 73 bales.

Q. On the basis of ten acres that would be seven and one-half, approximately seven and a half bales per acre. When you said your estimate was seven bales per acre—when you said “per acre” you

(Testimony of Kilian W. Smith.)

meant per acre of land. Was that on the basis of ten acres or seven and a half, or what?

A. Oh, that was—I haven't worked it out down to fractions. It is an estimate.

Q. Is it true in 1947 you harvested and baled a larger per-acre crop than was the average during the previous three years? A. Yes.

Q. In view of the mildew attack that you have described, how do you account for that larger-than-normal crop, harvested and baled, harvested-and-baled production in 1947?

A. Well, this was the third year of the yard's production and it was coming into full maturity. In other words, with a baby crop you don't get very many hops and the next year there is usually a lot of replanting, due to the babes dying out, and on the third year you will get your best production.

Q. Did you harvest and bale your entire production of 1947 cluster hops? A. No.

Q. What proportion did you not harvest?

A. I would say approximately 25 percent. [47]

Q. So that your total production, part of which you did not harvest, exceeded seven and a half bales per acre by approximately 25 percent, is that right?

A. Well, I could have picked probably 25 or 30 bales more, but we left them hanging on the vines.

Q. Did you cut down the vines that had infected hops? A. We cut them down after picking.

Q. After picking? A. Yes.

Q. Not before picking?

(Testimony of Kilian W. Smith.)

A. No, the pickers just skipped those that were real badly infected.

Q. Did they skip those that were not real badly infected? A. No.

Q. In other words, the pickers picked infected hops, is that right?

A. We skipped some branches and some arms that showed some infection. They picked a certain amount of infected hops along with the good hops.

Q. Would you call that selective picking?

A. To a certain extent.

Q. Did you instruct the pickers to pick selectively?

A. Yes, I told them to let the worst ones hang.

Q. Did you pay a higher rate for picking than the general wage for picking in your area at the time? [48]

A. No. At that time there was considerable bidding for pickers, and most of the yards in the valley were paying five cents at that time.

Q. Did you cut down any of the vines, that is, pull them down, vines that had been affected by mold or mildew, ahead of picking?

A. Ahead of picking?

Q. Yes. A. No.

Q. Would it refresh your memory, Mr. Smith, if I referred to your deposition in this case? May I read a question and answer which is up here on Page 20:

“Q. Did you cut down any of your vines, pull

(Testimony of Kilian W. Smith.)

them down, that had been affected by mold or mildew? A. You mean ahead of the picking?

“Q. Yes. A. No.”

I misread the deposition. So, you did not cut any of the vines down ahead of picking?

A. They were cut down later.

Q. After the picking had been completed?

A. Yes.

Q. Is it not a fact that the 1947 attack of mildew in your yard was the first time in your experience that mildew had hit a hopyard at that particular stage of development?

A. No, I had seen it prior to that time. [49]

Q. Specifically, when?

A. I believe in 1944. Mr. Seavey had it in his hopyard, his home hopyard.

Q. And what was the state of development of your yard at the time mildew hit it that year?

A. It showed on the cones similarly to the 1947 crop.

Q. Was that, at that time, general over the Willamette Valley? A. No.

Q. In 1947 was that type of attack of mildew which affected the development of cones general over the Willamette Valley?

A. How do you mean?

Q. Well, let's put it this way, Mr. Smith: Do you know whether or not other yards in the Willamette Valley were hit by the downy mildew in 1947 at about the same time your yard was hit?

(Testimony of Kilian W. Smith.)

A. Yes, there were other yards hit the same time.

Q. Were those yards in about the same stage of development that your yard was then?

A. There might have been a little variation; some yards will ripen maybe a week ahead of another yard.

Q. Would you care to generalize at all as to the situation in the Willamette Valley that year, as you knew it?

A. Well, I made a number of visits to different hopyards in the valley for the purpose of getting an average in my own mind and to try and compare my yard with others, and I saw others that showed a great deal more mildew damage and some that showed [50] less.

Q. Did you see many yards in the Willamette Valley that year where the cones had been hit by mildew just as those were in your hopyard?

A. Yes.

Q. Could you tell whether or not, generally, in the Willamette Valley, others had been hit with respect to the cones as yours were hit?

A. Generally, most of the yards I saw were hit.

Q. In about the same way that your yard was hit? Is that right? A. Yes.

Q. Which type of hops did you leave on the vines, fuggles or clusters?

A. We left clusters.

Q. And none of the fuggles, is that right?

A. No.

(Testimony of Kilian W. Smith.)

Q. You harvested your entire fuggle crop?

A. That is right.

Q. Your harvest came earlier in 1947 than in previous years, did it not?

A. Yes; that is, my fuggle harvest did; it came earlier. The late harvest was about the same.

Q. The first time Mr. Fry came out to your yard was what date?

A. I don't recall the date exactly. I think it was around the middle of August. [51]

Q. About August 15th, approximately?

A. Approximately.

Q. That was before the contract was signed?

A. Of course, yes.

Q. What was the stage or extent of the mildew infestation in your cluster yard at that time?

A. They had been hit at that time.

Q. Would you say it was a heavy attack at that time or a light attack?

A. I would say it was not a real light attack. It wasn't as heavy as most of the yards I had seen that year that I compared mine with.

Q. Is there any descriptive term you can apply to indicate to the Court how badly affected by mildew your cluster yard was on August 15th when you say Mr. Fry visited the yard?

A. It was about the same then as it was at picking time, because the hops were developed then.

Q. In other words, the mildew infestation did not get any worse after August 15th? A. No.

(Testimony of Kilian W. Smith.)

Q. What was the stage of development of the hop burrs at that time? Were they fully developed?

A. Most of the hop burrs were fully developed at that time. They were still a little tender; they had not fully matured.

Q. I believe in your deposition you stated it was a light [52] attack at the time Mr. Fry came out to your yard about August 15th. Would you say that is correct?

A. I never did say it was a heavy attack.

Q. Would you say now it was a light attack?

A. Yes.

Q. And you believed it was still a light attack at the time of harvesting? A. Yes.

Q. The contract, which is Exhibit No. 1, placed an estimate of 10,000 pounds (50 bales) upon your cluster crop of hops in 1947. Was that your estimate?

A. That was the figure that we mutually agreed upon. It was conservative.

Q. Was that your estimate?

A. It was not exactly my estimate. It was just the amount that we arrived at to put on the contract.

Q. What was your estimate?

A. I estimated we would get around 100 bales.

Q. 100 bales? A. Yes.

Q. 100 bales, that would be 20,000 pounds, would it not? A. Yes.

(Testimony of Kilian W. Smith.)

Q. In other words, your estimate was just twice the estimate specified in the contract, is that right?

A. Yes. [53]

Q. How do you explain the difference between your estimate of 20,000 pounds and the estimate of 10,000 pounds in the contract?

A. We usually try to be conservative in writing a contract. I did, in the days I was writing contracts; we very seldom would write a contract for more than five bales per acre, because that is the general average for the State of Oregon; was no argument about that.

Q. You actually had a very heavy set of hops on your cluster vines at that time? A. Yes.

Q. Heavier than a normal set? A. Yes.

Q. Was your estimate of 20,000 pounds an estimate of all the hops that could have been harvested from your yard? A. Yes.

Q. Including the blighted hops? A. Yes.

Q. Was the estimate that was agreed upon of 10,000 pounds an estimate of the prime quality hops that could be harvested from your yard?

A. There was no basis laid for the estimate.

Q. What I am trying to get at, Mr. Smith, is why you estimated 20,000 pounds of hops, blighted and otherwise, about August 15th, and your contract says 10,000 pounds. Was the 10,000-pound estimate at that time just an estimate of the prime quality hops? [54]

(Testimony of Kilian W. Smith.)

A. No, not that I know of. We just mutually agreed upon that figure.

Q. Did you suggest the figure of 10,000 pounds to Mr. Fry? A. Yes.

Q. Is it customary to underestimate by 50 per cent in a term contract for the production of the yard?

A. It is usually customary to underestimate so you are sure you can at least deliver the full amount. I know some fellows, when I was writing contracts, would overestimate for the purpose of getting heavier advances than they really required.

(Recess.) [55]

Q. (By Mr. Kerr): Mr. Smith, in the estimate of 10,000 pounds of hops set forth in the term contract, Plaintiff's Exhibit 1, did you intend to cover the blighted or mildew-infected hops as well as sound hops?

A. Well, we intended—we used it as an estimate, and I agreed in the contract for 10,000 pounds or the entire crop. I just wanted to be sure that they would take all the hops. In other words, if I would get out of them 50 bales, why, that is all they would have to take.

Q. Did you intend the 10,000 pounds to cover whatever you might harvest in and bale?

A. Well, it was just merely an estimate to base the advances on.

Q. As a matter of fact, the 10,000 pounds was

(Testimony of Kilian W. Smith.)

intended as an estimate of the prime quality hops that would come off of that yard that year; isn't that right? A. Well, I wouldn't say that exactly.

Q. Then what was it to cover?

A. What was what?

Q. What was the 10,000-pound estimate supposed to include?

A. Well, it was a basis for arriving at picking advances and to get somewhere close to letting him know how many we would have.

Q. That was intended, was it not, as the estimate by the two of you of the quantity of hops that would come up to the contract quality which would come off that yard? Isn't that what it was intended as?

A. That was not even mentioned. After all, Mr. Fry knew that there was both good hops and blighted hops there.

Q. Did you intend or expect that the buyer would take both the good and blighted hops?

A. Absolutely. He saw them.

Q. Whatever came off the yard, whatever you saw fit to harvest from that yard, the buyer was to take; is that your understanding of the contract?

A. Well, he looked at them.

Q. He looked at them, and he was to take whatever came off the yard and was baled; is that your understanding? A. Yes.

Q. I see. Even though the baled hops might be blighted?

(Testimony of Kilian W. Smith.)

A. And he knew they actually were, some of them.

Q. And even though they might be slack-dried?

A. No.

Q. Why not, if those were the hops that came off the yard and those were the hops you tendered to the buyer under the contract? I thought you stated those were to be the hops covered by the contract.

A. Well, I know that our slack-dried, you would expect to have them rejected or you expect to put them up in good shape so that they can use them.

Q. Now why did you expect the buyer under your contract to take mildew-infected or blighted hops and not take the slack-dried hops? [57]

A. I didn't quite get that.

Q. You didn't expect the buyer under this contract to take under the contract slack-dried hops, did you? A. No.

Q. Then why did you expect the buyer to take hops that were blighted or affected by mildew?

A. Well, because I gave him every chance in the world to look at them. I showed them to him and he inspected them and looked at them, and knowing that he was buying them to supply Mr. Oppenheim.

Q. Did you think that the buyer could tell what he was buying when the hops were merely on the vine?

A. I should say so, because they were already formed. The hops were there.

Q. Is it your contention that—

(Testimony of Kilian W. Smith.)

Mr. Kester: Just a minute. I don't think the matter of what the witness contends any buyer could tell is material. Let's stick to the facts.

The Court: Go right ahead.

Mr. Kerr: What was the last question?

(Last question read.)

Mr. Kerr: Strike that.

Q. You have been a hop buyer, I believe you stated, for Mr. Seavey? A. Yes. [58]

Q. And when you were a hop buyer for Mr. Seavey did you go out and buy for Mr. Seavey on term contracts hops which were on the vines and take delivery of those hops while they were on the vines? A. No.

Q. Why not?

A. Because they had to be in the bale before you could accept them.

Q. Is it customary among dealers, as you understand the customs as a result of your experience, among dealers, buyers, agents of buyers or agents of dealers, to buy hops merely upon the basis of how they appear on the vine at the time the term contract is made?

A. I have seen hops on the vine that were so badly damaged by mold that they were actually black, and sticky with honeydew, and at that time, why, we would advise them to leave those out.

Q. But what if the grower did not leave them out, but harvested and baled those hops, and tendered them to you as a buyer, were those covered

(Testimony of Kilian W. Smith.)

by the contract, and was a dealer in the custom of the trade required to accept those because he saw those black hops on the vine?

A. Well, that depended a lot on the market. We took in some stuff that was pretty doggone black, just because the market was really short.

Q. Did you reject any, to your knowledge? [59]

A. I didn't reject any hops that I took in myself for Mr. Seavey.

Q. Do you know whether your employer did during those years? A. Yes.

Q. By reason of what?

A. Well, he rejected some of mine because they were slack-dried.

Q. Did he reject any hops which you had contracted for in his behalf?

A. I can't recall any specific example.

Q. At the time the sales slip that you referred to was made out did you deliver any hops to Mr. Fry at that time? A. No.

Q. Were any of the hops baled at that time?

A. Some of the fuggles were.

Q. Were any of the clusters baled?

A. No.

Q. Were the clusters harvested?

A. What?

Q. Were any of the clusters harvested at that time? A. None of mine.

Q. As a matter of fact, the so-called sales slip which you referred to was intended as a memoran-

(Testimony of Kilian W. Smith.)

dum of the terms of the contract later to be drawn and signed; isn't that the case?

A. No; I used those myself in buying hops, and we used to hand the customer a dollar and sign him up on a slip like that after [60] his hops were picked and baled.

Q. Was that on a spot sale or a term contract?

A. Spot sale.

Q. Spot sale. And it was quite a different matter from the case here involved, wasn't it?

A. Somewhat different.

Q. Quite different, is it not?

A. That is probably a matter of opinion.

Q. You believe that there is only a slight difference between a term or future contract for the purchase of hops and a spot purchase of hops?

A. Yes, on a term basis there is a difference.

Q. As a matter of fact, a contract for future delivery is made before the baled hops are even in existence; isn't that the case?

A. Well, I don't recall of ever making any contracts when the hops were actually developing on the vines. I usually wait a week or so and then just buy them right out.

Q. When you wait a week or so and buy them right out and buy them in the bale, that is a spot purchase, isn't it?

A. Well, we have signed up agreements that were not contracts that would call for the delivery of hops when they were picked and baled. It wasn't

(Testimony of Kilian W. Smith.)

a contract form. It was different than that. We used both forms.

Q. Did you use this form of sales slip for that purpose?

A. We used that for spot purchases. [61]

Q. Yes. The sales slip is designed for spot purchases? A. Yes.

Q. When it refers to the sample delivery, that refers to the sample on the basis of which the spot purchase is made, does it not?

A. That is what it refers to.

Q. And you delivered no sample to Mr. Fry at the time this sales slip was signed?

A. I delivered no sample, but I had let him inspect the hops; in fact, I insisted that he inspect them.

Q. But no sample of baled hops out of your yard in 1947 was delivered by you to Mr. Fry at that time? A. No.

Q. Or anyone else acting for Hugo V. Loewi, Inc.? A. No.

Q. At the time that the sales slip was signed by you, or on that occasion, you say Mr. Fry went out into the cluster yard with you?

A. No, he went out prior to that, a few days earlier.

Q. Oh, that was a few days before that; is that right? A. Yes.

Q. Were you with him then? A. Yes.

Q. Did he go out into the cluster yard when he was there to give you the so-called sales slip? [62]

(Testimony of Kilian W. Smith.)

A. No.

Q. Neither one of you went to the cluster yard at that time, is that right?

A. At the time he gave me the sales slip?

Q. That is right. A. Not that I recall.

Q. Now, will you relate to the Court exactly the conversation between you and Mr. Fry so far as you can remember it now at the time that you and Mr. Fry first went out into the cluster yard in 1947?

A. Well, he stated he wanted to buy hops, and I says, "Well, let's go out and look at them." I says, "I have got some mildew." And he says, "Well, I know; they are infected all up and down the Valley. I have been running around looking at hopyards during the past week with Mr. Oppenheim." I says, "Well, you better come back and take a look at mine, then, and get an idea that you can talk to him about and tell him what they are like." And he didn't want to go back, and I insisted because I wanted him to know what he was buying. So he did. We walked back there, and I purposely took him through. We crossed and crisscrossed all through the yard.

Q. Did Mr. Fry at that time warn you about the inclusion of blighted hops in the harvesting of your hops?

A. No, he didn't even want to look at them.

Q. I will repeat the question so I am sure you understand it. [63] Did Mr. Fry warn you about the inclusion of blighted hops? A. No.

(Testimony of Kilian W. Smith.)

Q. To refresh your memory—And I believe this time I will read the deposition correctly—the deposition previously taken in this case, on Page 19, reads as follows:

“Question: Did he”—referring to Mr. Fry—“warn you about the inclusion of blighted hops?”

“Answer: Yes.”

Mr. Kester: Just a moment. Will you advise the witness what conversation that refers to.

Mr. Kerr: Let me ask you this: Did Mr. Fry at any time while he was in your cluster yard warn you about the inclusion of blighted hops?

A. Yes. He did when he came out while we were talking.

Q. But that was later than the occasion we have been discussing? A. Yes.

Q. That was about when, Mr. Smith?

A. That was the third day of picking. I wanted him to look over what we had picked, what we had skipped, and to advise me on whether I was doing right or not.

Q. And what was the conversation at that time with respect to the blighted hops?

A. Just “Do the best you can.”

Q. Did he say anything about the price being lower if you picked blighted hops? [64]

A. Well, he stated at that time that there might be a cut because of mildew damage.

(Testimony of Kilian W. Smith.)

Q. Do you recall the language he used?

A. Oh, not exactly. We were discussing the general amount of blight in hopyards of the Valley, and he stated at that time that he didn't see how we could get away from getting some blight in.

Q. Did he discuss with you the matter of selective picking of your clusters in order to avoid the blighted hops?

A. He said to continue to pick them as clean as possible and do the best I could.

Q. Did he say anything about leaving blighted hops unharvested? A. Yes.

Q. What was your discussion along that line?

A. About leaving blighted hops?

Q. Yes.

A. Well, we decided that the pickers would not pick any that were really badly blighted or had a lot of those small nubbins because, after all, they were looking for the big hops, nice clusters, because that is what makes weight in their baskets.

Q. Then at that time—And this, I take it, was the latter part of August; is that right?

A. Yes.

Q. At that time you and Mr. Fry did discuss leaving the blighted hops on the vines; is that right?

A. As many as possible, yes.

Q. Now, when did Mr. Byers first come to your yard?

A. I think on the 19th of August, the 19th or

(Testimony of Kilian W. Smith.)

20th, when he delivered the two contracts for my signature.

Q. And was anything said to him at that time about the mildew attacking your yard?

A. I don't recall any conversation along those lines.

Q. Did he go out in the cluster yard with you?

A. No.

Q. As a matter of fact, he was in very much of a hurry that particular time, was he not? Both of you were?

A. Yes.

Q. So he didn't stay very long at your place on that occasion?

A. No.

Q. He merely brought out the contract for your signature; is that right?

A. And delivered the advance check on fuggles.

Q. Now, you referred to some advice, Mr. Smith, you say you had from Mr. Fry about going ahead and picking. That was after the contract was signed, was it?

A. Yes.

Q. You were not picking when the contract was signed?

A. No.

Q. You had not started picking yet?

A. No. [66]

Q. And that was how long before you did start your cluster hops?

A. About a week.

Q. A week before harvest what was your estimate, if you made one, of the production of clusters that you would get off of the yard? Was it still 20,000 pounds?

A. Yes.

(Testimony of Kilian W. Smith.)

Q. You intended at that time to harvest the full 20,000 pounds in the yard; is that right?

A. No.

Q. What did you intend to harvest?

A. The best part of them, as well as I could.

Q. Was your yard uniformly infected by mildew at that time or was it spotted? Were some parts of the yard infected more heavily than others?

A. It was quite uniform. There were a few hills that were worse than others.

Q. Were there some portions of the yard that were more seriously affected than others?

A. But the degree wasn't very great.

Q. Then this 50 percent, which I understood you to say was the degree of infestation, was that the degree of infestation at this August 31st date when Mr. Fry came out the second time?

A. That was an estimate, my own estimate, of those that were touched with mildew. [67]

Q. Was that 50 percent uniform throughout the yard, or did it not apply so much in some parts of the yard? A. It was quite uniform.

Q. How many of your clusters had you harvested at the time that you say Mr. Fry advised you to go ahead with your picking?

A. Oh, I would say approximately 20 bales.

Q. About 20 bales. That would be not quite a third of your total harvest of clusters that year; is that right? A. That is right.

(Testimony of Kilian W. Smith.)

Q. Were they in the bale yet or were they in the kiln?

A. One kiln was dried, and I think we were dumping another one on the floor.

Q. No bales as yet formed? A. No.

Q. Just what was it Mr. Fry said about your going ahead and picking?

A. He said to be sure and pick them as clean as possible and be sure they are dried well. I told him to go up and instruct my drier just exactly how he wanted them dried and to take a look at them on the kiln and instruct him accordingly.

Q. Did he do that? A. Yes.

Q. Do you know whether or not he then warned your drier about the drying of the hops?

A. Yes.

Q. And whether or not he warned you or the drier about including [68] blighted hops in the mix?

A. I don't recall that.

Q. This was about August 31st; is that right?

A. No, I think it was a few days earlier.

Q. A few days before August 31st?

A. Yes.

Q. This was the second visit of Mr. Fry?

A. This was the occasion of him giving me the advance.

Q. Did you ask anyone else from Mr. Paulus' office whether or not you should go ahead and pick your clusters? A. No.

Q. And you didn't ask Mr. Paulus?

(Testimony of Kilian W. Smith.)

A. No.

Q. You didn't ask Mr. Oppenheim?

A. No.

Q. You didn't ask Mr. Byers? A. No.

Q. You asked only Mr. Fry; is that right?

A. Yes.

Q. And he told you to skip as many blighted clusters as you possibly could? A. Yes.

Q. Did you ever see Mr. Paulus at your yard?

A. After the hops were picked.

Q. When was that? [69]

A. Well, that is difficult to recall that exact date.

Q. Well, can you tell approximately how long after the hops were picked Mr. Paulus was at your yard?

A. Oh, it may have been three weeks or six weeks. I don't recall exactly.

Q. And the hops were then in the bale and in the warehouse, were they not? A. Yes.

Q. What was the occasion for his coming out to your yard then?

A. He came out with Mr. Byers. I happened to be in the hopyard covering up a ditch, and he stated that Mr. Oppenheim didn't like my hops.

Q. Just what was the conversation at that time?

A. Well, he stated that Mr. Oppenheim didn't like my hops and was going to reject them. And I says, "Well, if he doesn't like them, why can't we get together on some other basis?" I says, "If he is having an awful time selling them, I am willing

(Testimony of Kilian W. Smith.)

to make a little concession," and I asked him to contact Mr. Oppenheim.

Q. Did Mr. Paulus say that he would?

A. Yes. He said he would try his best to, to see that they would go through.

Q. Did he discuss the quality of your cluster crop at that time? A. Not specifically. [70]

Q. You stated that you were asked to sign the letter which is Exhibit 5, I believe, the letter agreeing to inspect the sampling and weighing of the bales without such constituting an acceptance by the buyer. Who was it who asked you to sign that letter? A. Mr. Fry, I think.

Q. And when was it that he asked you to do that?

A. The day he inspected and sampled the hops.

Q. What was the conversation at that time between you and Mr. Fry with respect to that letter, if you remember?

A. He told me at that time that he had no authority to accept or reject the hops, and that he would have to have this thing signed before he could even go ahead, and he wanted to get the weights.

Q. Now, these were the cluster hops you are talking about? A. Yes.

Q. The fuggle hops had previously been sampled, had they? A. I think they were.

Q. And this conversation took place where?

A. In the Oregon Electric Warehouse.

(Testimony of Kilian W. Smith.)

Q. That is where both the fuggles and the clusters were? A. Yes.

Q. And had the fuggles been accepted and taken in prior to that time? A. I don't remember.

Q. Were the clusters then stamped and inspected by Mr. Fry after [71] you signed that letter? A. Yes.

Q. Was anyone else present at the time that you discussed that letter with Mr. Fry?

A. Mr. Weathers was around there. I don't know if he was there when we were discussing that particular letter or not.

Q. Might it be that he was present within hearing when that letter was discussed?

A. It is possible.

Q. Were the cluster hops sampled and inspected by Mr. Fry immediately after that, immediately after you signed the letter? A. Yes, sir.

Q. And on the same day? A. Yes.

Q. Had you previously asked anyone in Mr. Paulus' office or anyone to come down and inspect and take in the clusters? A. Yes, sir.

Q. When did you make that request?

A. At the time I selected the market price. I wanted him to weigh them as soon as possible. I wanted a settlement.

Q. Was that request made to Mr. Byers?

A. To Mr. Paulus.

Q. That request was made to Mr. Paulus. Was it by telephone or in his office?

(Testimony of Kilian W. Smith.)

A. While I was in his office. [72]

Q. What did Mr. Paulus say?

A. He said he couldn't weigh them until he had authority from Hugo V. Loewi.

Q. Now when did that take place?

A. I think the middle of September.

Q. About the middle of September in Mr. Paulus' office? A. Yes.

Q. You asked Mr. Paulus to send over and have the clusters taken in; is that right? A. Yes.

Q. And Mr. Paulus told you that he couldn't do so until he had authority from Hugo V. Loewi; is that right? A. Yes.

Q. Then did Mr. Paulus communicate with you later about taking in those clusters?

A. About what?

Q. About taking in the clusters?

A. He sent me a letter telling me they were rejected later.

Q. Before you got the letter of rejection you signed this letter agreeing to the inspection of the hops, didn't you? A. Yes.

Q. Did anyone talk to you about the taking in of your hops or, rather, the inspection of your hops before you signed that letter or before you and Mr. Fry discussed that letter?

A. Well, we talked about it. I made several trips up there, [73] and was in quite a hurry to have the hops weighed in.

Q. When was it you talked about it?

(Testimony of Kilian W. Smith.)

A. Well, between the time that I selected my price and the time they were taken in; probably two or three visits to Mr. Paulus' office in that time.

Q. Did Mr. Paulus ever tell you that he had finally been authorized by Hugo V. Loewi to sample, inspect and weigh the hops?

A. Yes. He said under the contract he could do that any time.

Q. When was this?

A. One of the times I was in his office. I don't recall the exact visit.

Q. That was after he had previously told you that he had to get authority from Loewi first?

A. Yes.

Q. And then later he told you that he could go ahead and sample them, inspect them and weigh them; is that right?

A. Yes.

Q. And then it was sometime after that last conversation that Mr. Fry showed you this letter of October 10th which you signed giving permission to inspect; is that right? Is that the sequence of events?

A. I believe——

Q. October 3rd, was it?

A. Yes, it was October 3rd. [74]

Q. October 3rd is the letter which you signed giving authority to inspect; is that right?

A. Yes.

Q. And it was before October 3rd, then, that Mr. Paulus told you he had been authorized to go ahead and inspect the hops?

A. Yes.

(Testimony of Kilian W. Smith.)

Q. When you asked Mr. Paulus to inspect and take in the clusters did you ask for payment for the fuggles? A. I don't recall.

Q. Did you ask anyone for payment for the fuggles? A. I don't recall that.

Q. Do you recall the day that you received a check that you identified as the check tendered to you for the amount of the contract price of the fuggle hops less all advances made? Do you recall that? A. I don't recall the exact date.

Q. Well, do you recall the occasion which led up to the execution of that check?

A. It was after Mr. Byers had received the fuggles, had taken them in and weighed them.

Q. Now, will you tell us about the taking in and weighing of the fuggles by Mr. Byers. When was that? A. I don't recall the exact date.

Q. Do you recall where it was?

A. It was at the Oregon Electric Warehouse.

Q. Isn't it a fact that at that time you asked him to take in the fuggles—You asked him first to take them in, did you not? A. Sure.

Q. Did he say anything to you about payment for them? A. Payment for the fuggles?

Q. For the fuggles, yes.

A. Well, he told me after he had taken them in, yes. He said, "We will go up to the office and settle up after we are through."

Q. Did he at the warehouse tell you that he would have to deduct from the contract price pay-

(Testimony of Kilian W. Smith.)

able on the fuggles all advances made including advances on the clusters?

A. I believe that was mentioned. I think he did talk about that.

Q. He told you that he would have to do that if he took in the fuggles; is that right?

A. Yes. He said he had no authority to take in the lates.

Q. What did you say?

A. Well, I says, "Go ahead and do it, and we will talk about it later."

Q. Did you agree that he would take in the fuggles and then pay for the fuggles less all advances which had been made?

A. He wouldn't have weighed the fuggles. That was the only way I could get them weighed in. I had to get them weighed in to get a settlement with Mr. Seavey on this former 100 bales.

Q. I see. Was it agreeable with you at that time that the fuggle hops be taken in and accepted and weighed and paid for [76] less the amount of all advances that had been made to you both for the fuggles and the clusters?

A. It was not agreeable, but I let him go ahead.

Q. Did you tell him it was all right?

A. I told him to go ahead. I never did agree about it.

Q. But you told him to go ahead on that basis; is that right? A. Yes.

Q. And it was on that basis, then, that he did weigh and accept and take in the fuggles; is that right? A. Yes.

(Testimony of Kilian W. Smith.)

Q. And after he had weighed the fuggles both of you went up to Mr. Paulus' office; is that right?

A. That is right.

Q. And Mr. Byers in Paulus' office at that time made out this check which is Exhibit 9 for \$3,497.26; is that right? A. Yes.

Q. Did he tell you at that time how the amount of this check was arrived at?

A. He handed me a statement with the figures on it.

Q. Is that statement this hop purchase invoice dated October 25th which is in evidence as Exhibit 33-C? A. Yes.

Q. And he handed that to you along with the check for the fuggle price less the advances; is that right? A. Yes. [77]

Q. There was no dispute between you at that time, was there, or no question as to the amount that had been advanced to you for the fuggles and the clusters; is that right?

A. No dispute as to what?

Q. There was no question about how much you had received in advances? A. No.

Q. You have mentioned some hops which I believe you said you had sold or contracted to Mr. Seavey. Is that the Seavey Hop Company or Mr. Seavey personally?

A. The Seavey Hop Company.

Q. Those were fuggles from the same yard as the fuggles which were taken in by the defendant in this case; is that right? A. Yes, sir.

(Testimony of Kilian W. Smith.)

Q. Did the Seavey Hop Company take delivery of those fuggles? A. Yes.

Q. When?

A. He weighed them prior to the date that Mr. Byers took in the 59 bales, and he paid me for them December 31st.

Q. At what price did he take them in? The contract price or some lesser price?

A. He took them in at a lesser price.

Q. Why?

A. Because Mr. Seavey had not had them sold, and I wanted to settle before the end of the year due to income tax purposes. [78] If they had gone over to the next year, why, I would have had a terrific income tax in one year.

Q. What was the contract price?

A. 91 cents.

Q. What price did he pay you? A. 75.

Q. That was the only reason for your reselling the hops to him at a lower price than the contract price?

A. He hadn't had them sold. He contracted them on his own hook. He hadn't had them sold to any other dealer or brewer, and he tried to hold me off until he could place them. And I don't know whether he has got them placed yet. But I told him he bought them and we had to arrive at some settlement, and at that time he figured the market was around 50 cents—or around 60 cents, I believe,

(Testimony of Kilian W. Smith.)

somewhere in that neighborhood, and we agreed to meet him halfway.

Q. Were those hops mildew damaged?

A. Oh, a very slight touch.

Q. 1947 was not a good hop-producing year in the Willamette Valley, was it? A. No.

Q. It was not a good year for hops in your own yard?

A. Well, I figured the hops were richer except for mildew.

Q. Except for mildew?

A. They had nicer, bigger berries, and there was more lupulin [79] in them.

Q. Have you ever sold hops to a dealer on the basis of the amount of lupulin in the hops?

A. They have been sold that way, I understand.

Q. Have you ever sold them, Mr. Smith?

A. On the basis of lupulin?

Q. Of lupulin.

A. That is always taken into consideration. When a hop is being bought the buyer inspects them; he breaks open the sample and sees how rich it is. If it has got a lot of lupulin they say it is a fat hop.

Q. How does a buyer determine the lupulin content when he breaks open the sample and looks at it?

A. The buyer usually does it by visual inspection.

Q. What does he take into consideration on that visual inspection?

(Testimony of Kilian W. Smith.)

A. He takes into consideration the amount of lupulin that is in the hop.

Q. How does he determine the amount of lupulin in the hop? A. I said by a visual inspection.

Q. That is, he looks for the lupulin itself?

A. Sure. He looks at it and feels.

Q. As a matter of fact, he judges the probable lupulin content by the appearance of the hop, does he not, the color?

A. No, he breaks the hop open to find the lupulin. That is under the petals.

Q. He breaks an individual cone, then, and feels it for lupulin; [80] is that right?

A. Takes an individual cone and breaks it in two so he can see the bases of the petals where the lupulin is.

Q. Is that the only visual inspection that the buyer makes of the sample?

A. No, he makes a lot of them.

Q. What are those others?

A. Oh, turns them all around and looks at them on the side cuts.

Q. What is he looking for?

A. He is looking for—he can tell on the side cut the amount of lupulin, and can smell it. He will turn it around and break it in two and examine it. He will take a handful and rub them in his hands and smell them for aroma. He will look for mold and he will look for——

(Testimony of Kilian W. Smith.)

Q. Downy mildew damage? A. Yes.

Q. Look for nubbins?

A. He probably would if they were there.

Q. When you were buying hops for Mr. Seavey, did you look for downy mildew damage in the samples?

A. I looked at them quite closely. There usually wasn't any downy mildew when I was buying except for the one crop that I stated that I saw.

Q. But you looked for it, didn't you?

A. We looked for everything. We looked for red spider; we looked [81] for mold; we looked for leaves and stems, and how it was put up, how much spring it had.

Q. You stated that your 1947 clusters were of merchantable quality. Did you mean by that that they were salable? A. I absolutely did.

Q. You consider any hop which is salable as a prime quality hop?

A. Any hop that has preservative value; that is, that has the stuff in it that it is required for. In my case these hops had a lot of lupulin in them. In fact, my analysis showed that they were above the average for the state.

Q. Mr. Smith, say that I as a buyer of hops buy to shake the lupulin out of them, just to get the lupulin from the hops, and I purchased a quantity of hops that was badly blighted, very poor color, brown because of blight, which ordinarily would not sell to brewers or for the brewing trade, but did

(Testimony of Kilian W. Smith.)

sell to me because I wanted them for the lupulin, would you say that because I bought them they were prime quality hops?

Mr. Kester: I don't know that that is a question possible to answer, your Honor. It is completely speculative.

The Court: Oh, this is his principal antagonist, so I will not try to shorten the examination. Answer if you can.

A. I don't think I can answer that.

Q. (By Mr. Kerr): Your definition of a prime quality hop is any hop which is of merchantable quality; is that right? [82] A. Yes.

Q. And it makes no difference how it looks?

A. Well, that has something to do with its merchantable quality.

Q. What does the appearance of the hop have to do with its merchantable quality?

A. Well, it has got to be a good, rich hop; it should be developed; should have——

Q. Just a minute. What do you mean by “developed?” A. It should be mature.

Q. Would you say fully matured?

A. Yes.

Q. And what else with respect to appearance?

A. It should have a silky, oily feeling.

Q. Would you say it should be of good color?

A. To be marketable?

Q. Of merchantable quality? A. Yes.

Q. And what is a good color?

(Testimony of Kilian W. Smith.)

A. An average color.

Q. An average color. An average of what?

A. Well, an average for the season.

Q. Where?

A. In the area or the state grown.

Q. For instance, take your hops. What area determines whether or not your hops are prime quality? [83]

A. The Willamette Valley.

Q. The entire Willamette Valley? A. Yes.

Q. Who determines what the average appearance of hops produced in the Willamette Valley is for a particular year? A. The hops themselves.

Q. Who looks at the hops, all of them or most of them, in the Willamette Valley and determines what the average appearance is?

A. All of the people and growers in the trade.

Q. Did you look at them all?

A. Not all of them.

Q. How many of the 1947 Willamette Valley crop of clusters did you look at personally?

A. A great many.

Q. How many?

A. Possibly 20 or 30 yards. I made several trips all day with Mr. Seavey.

Q. These were trips to the yards while the hops were hanging on the vines; is that right?

A. While they were hanging on the vines and while they were being picked.

Q. Did you see those hops later in the bales?

A. Yes.

(Testimony of Kilian W. Smith.)

Q. Would you say that you saw a great many of the Willamette Valley 1947 cluster hops in the bales? [84]

A. Yes, yes; in the bales.

Q. And in determining whether or not your hops were prime quality, then, you take into consideration the color of all of these other hops; is that right?

A. Right.

Q. Where did you see all these others hops in the bales?

A. At the Oregon Electric Warehouse, at the Donald Warehouse, and at Schwab's Warehouse at Mt. Angel.

Q. You looked at samples of them, did you?

A. I saw a great many samples. I visited all of these warehouses, because that had been my job previously. I was still interested in it, in keeping up. I saw a lot of hops taken in on job contracts that were a lot worse than mine.

Q. And on the basis of your viewing of these samples of Willamette Valley cluster hops in '47 you judged your own hops as to whether or not they were prime quality; is that right?

A. Yes, and I had other people look at them, too.

Q. Now, what, other than color, determines whether or not the hop is of merchantable quality?

A. Well, in my mind the laboratory analysis has the biggest thing to do with it, because most of these—or a lot of these brewers sent them to

(Testimony of Kilian W. Smith.)

laboratories to be analyzed for their resins and their preservative qualities.

Q. Do you know that of your own knowledge?

A. Please?

Q. Do you know that of your own knowledge?

A. Yes.

Q. Do you know how many brewers in the United States do that? A. No.

Q. Does your contract with Hugo V. Loewi on the cluster hops for 1947 say anything about a chemical analysis? A. No.

Q. All right. What other factor determines whether or not the hops are of merchantable quality? What about sound condition? Must they be in sound condition? A. Yes.

Q. What does that mean?

A. Well, they should be well packed.

Q. Would you say uniformly packed?

A. Yes.

Q. Are you familiar with the term "false-packing?"

A. The first time I had heard it was in this courtroom, or these depositions.

Q. In your experience does it sometimes occur that the hops in a bale will not be thoroughly mixed and therefore would not be of uniform type, quality or condition? Does that sometimes happen?

A. It could happen at times. Most probably—Most often it happens when hops are moldy, because if the picking season stretches out for quite

(Testimony of Kilian W. Smith.)

a length of time, why, as these spores are in the hops they keep on dying and the hops become blacker, [86] more moldy, and you will see a variation in a condition like that. Normally you see very little variation.

Q. Does it sometimes occur when the hops are not thoroughly mixed that hops that are a different color from others are localized within a certain part of the bale?

A. Well, hops are usually thoroughly mixed when they are put on a kiln.

Q. They should be, at least, should they not?

A. They are dumped out of a sack, and then when they are dumped off into the cleaning room or storeroom, why, they are scooped out of there and just dumped in a big pile and rolled down. I don't see how you could mix them better with a paddle.

Q. They should be, in any event, thoroughly mixed before they go in the bale? A. Yes.

Q. Now, as I understand your definition of prime quality, it is based entirely upon the average?

A. That is my opinion.

Q. For the entire Willamette Valley; is that right? A. That is my opinion.

Q. And you do not take into consideration, then, at all the hops of the quality and condition of hops grown, say, in Grants Pass that year?

A. How do you mean, take into consideration? Will you restate that, please? [87]

Q. Well, you would not compare your hops with

(Testimony of Kilian W. Smith.)

hops grown in the Grants Pass area in order to determine whether or not your hops were prime hops; is that right?

A. It is usually a different type of hop if it comes from a different area.

Q. Well, they are all sold, are they not, as hops, Pacific Coast hops? A. Yes.

Q. They are all clusters, are they not, and have the same type clusters? A. Yes.

Q. Do you compare your hops with cluster hops produced in Eastern Oregon to determine whether or not your hops are prime?

A. Well, there is a different type of hop grown in Eastern Oregon than there is in the Valley.

Q. A different type in that it has no mildew damage, you mean?

A. It is usually a greener color. It is an irrigated hop.

Q. You make no comparison of the hops grown in the two areas in respect to mildew damage; is that right?

A. They usually don't have mildew there.

Q. They usually don't have mildew damage?

A. That is right.

Q. How about the Yakima, Washington, hops?

A. It is the same case there. It is a different hop, different type of hop entirely. [88]

Q. In any event, you would not have any means of knowing——

A. Well, Yakima hops are sold as Yakima hops,

(Testimony of Kilian W. Smith.)

and Oregon hops are sold as Oregon hops. And by "Oregon"—The greatest share of Oregon hops are in the Willamette Valley.

Q. Well, Grants Pass hops are sold as Oregon hops, are they not?

A. They are usually stipulated Grants Pass hops, or California hops.

Q. Stipulated by whom?

A. People that I have talked to in the trade.

Q. As between whom? I mean, between brewer and dealer or dealer and grower?

A. Usually dealer.

Q. Dealer and grower?

A. I would say dealer. I haven't talked to any Grants Pass dealers, to my knowledge.

Q. So you don't know how the Grants Pass hops are sold?

A. I have never been down in the Grants Pass hop area.

Q. You referred to having sold while with Mr. Seavey some junk; is that right? A. Yes.

Q. In your opinion was that junk prime quality?

A. It was taken under prime quality contracts.

Q. In your opinion was it prime quality?

A. No.

Q. Why not? [89]

A. Because it was badly damaged by mildew or by mold.

Q. Do you contend that the mere fact that a buyer may accept hops under a contract calling for a prime hop makes those hops prime?

(Testimony of Kilian W. Smith.)

A. Does it make them prime?

Q. Yes. In other words, it was junk whether taken under a prime contract or on a spot sale, wasn't it?

A. Yes.

Q. Surely.

A. But it was sold and they made beer out of it.

Q. Do you know anything about the sale of it to the brewer?

A. Of those types of hops?

Q. Yes.

A. Yes, I know they went through.

Q. What year was that?

A. A great part of them in 1944.

Q. Even if Mr. Fry had not told you to pick your clusters, as you contend, you would have picked them all, would you not?

A. No.

Q. Why not?

A. Because I wanted him to have the responsibility. That is why I asked him to come out and make the advance. I didn't want to put my own money into them unless he okehed it.

Q. Isn't it a fact, Mr. Smith, that you on the basis of your experience as a dealer and as a buyer tried to pin Mr. Fry down [90] to a definite commitment to take those hops, and he refused to do it and would not fall into that trap? Isn't that the fact?

A. I wanted him to definitely understand what the hops were like, and I wanted him to definitely take that advice to his principals.

Q. I see. That was your purpose, to inform his

(Testimony of Kilian W. Smith.)

employer, Mr. Paulus, as to what the condition of your hops was; is that right?

A. Yes. I wanted him to know so he could tell me whether he wanted to buy them or not to buy them. I wanted him to tell me that.

Q. Now, of course,—

A. I didn't want him to take something that he couldn't—he felt he didn't want. I wasn't trying to be unreasonable with him. I was giving him all the room in the world.

Q. If you had not talked to Mr. Fry at all or to anyone else representing Mr. Paulus about the condition of your hops or whether or not they should be harvested, would you have gone on and picked them? A. If I hadn't sold them, you mean?

Q. No, if you hadn't talked to anyone about the condition of them?

A. Would I have gone ahead and picked them?

Q. Yes.

A. I don't think I would have at the price we had to pay. [91]

Q. That is to say, even though you had them contracted at this high price you would not have picked them? A. I don't think I would have.

Q. Then why was that?

A. Because it cost a great deal to harvest them. Labor was so high-priced. I was dubious as to the amount of hops that were going to be produced. I felt there was going to be a large crop, and I felt that these fellows made poor estimates, and I didn't want to be caught.

(Testimony of Kilian W. Smith.)

Q. In other words, you felt that you would not be able to harvest a high-quality hop that year; is that right?

A. I didn't want to harvest them unless I felt they were sold.

Q. Well, was it your opinion that they would not be a high-quality hop?

A. It was my opinion that they had mildew, and if that had anything to do with it they can always find something—some basis of rejecting hops when the market slips down. And they definitely had mildew and they knew it.

Q. Mr. Fry didn't tell you that the hops would be accepted, did he?

A. Well, he says he wants hops. He sent me out here to contract them.

Q. At this late-in-August date when you say he told you to go ahead and pick, did he tell you then that the hops would be accepted? [92]

A. He said, "Sure, we want you to pick them." He says, "If you need more money, call us and we will give you some more." He said if I had to go to six or seven cents a pound, why, feel free to ask for more money.

Q. Was it at that time that he warned you about blight?

A. It was at that time he told me to pick them and dry them the best I could.

Q. And to avoid, so far as possible, any blighted hops; is that right?

A. That is right.

(Testimony of Kilian W. Smith.)

Q. And that is the time that you say he told you to pick?

A. Yes; he saw how we had been picking and he saw what had been picked.

Mr. Kerr: That is all, Mr. Smith. Thank you.

Redirect Examination

By Mr. Kester:

Q. Mr. Smith, at the time you made this deal with Mr. Fry and this contract was entered into would you have sold him the fuggles without the clusters going along with it?

A. No, I wanted to sell all the hops to one buyer.

Q. At the time this contract was entered into I believe you stated that the fuggles had already been picked?

A. Yes, at the time the contract was signed.

Q. Did Mr. Fry know that they had already been picked?

A. Well, I think Mr. Byers did, because he was there when—he [93] was waiting at the hop house when the crew was baling the fuggle hops.

Q. At the time they made the first advance—The first one was the \$3500 advance, wasn't it?

A. Yes.

Q. At the time they made that first advance did Loewi's representative know your fuggle crop had already been picked and baled?

A. I don't think he did. He knew after he got out there.

(Testimony of Kilian W. Smith.)

Q. He knew after he got out there and before you got the check that the fuggles had already been picked? A. Yes.

Q. So, did he know that that money was not going into the fuggles but was going into the cluster crop instead?

A. He must have, because I told him that he had already advanced the picking of my fuggles and that I would not need the fuggle money and I would go ahead and use it on the lates.

Q. Did they say that was all right?

A. Sure.

Q. So that all the advances that were made went into the cluster crop and none of it went into the fuggle crop?

A. That is right. The pickers were already paid off.

Q. So in order to get the fuggles they made these advances for the clusters, and then charged those cluster advances back against the fuggle price. Is that the deal? A. Yes. [94]

Q. Would you have put your own money into harvesting the clusters if they had not made those advances? A. No.

Q. Did you ever have any conversation with Mr. Oppenheim during 1947? A. No.

Q. Did you ever meet the gentleman before the occasion here in court? A. No.

Q. Have all your transactions with the firm been

(Testimony of Kilian W. Smith.)

carried on through the office of Mr. Paulus and his employees? A. Yes.

Mr. Kester: That is all.

Mr. Kerr: That is all.

(Witness excused.)

(Recess.) [95]

H. A. CORNOYER

was thereupon produced as a witness in behalf of the Plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kester:

Q. State your name, please.

A. H. A. Cornoyer.

Q. Where do you live, Mr. Cornoyer?

A. Salem.

Q. What is your business?

A. Beg pardon?

Q. What is your business?

A. Hop dealer and broker.

Q. How long have you been engaged in the hop business? A. Oh, better than forty years.

Q. In and around the vicinity of Salem most of that time? A. Beg pardon?

Q. Around Salem most of that time?

A. Yes.

Q. Do you represent any particular hop dealers?

A. One.

(Testimony of H. A. Cornoyer.)

Q. Would you state who that is, please?

A. P. F. Bing, Inc., New York.

Q. During your years of experience in the hop business have you represented various hop buyers?

A. Yes, sir.

Q. Would you give us a general idea of the extent of that experience.

A. Oh, Wigan & Richardson of London since 1913.

The Court: What are you going to cover by him?

Mr. Kester: He will testify with respect to the quality of the hops, your Honor.

The Court: These particular hops?

Mr. Kester: Yes, as well as certain matters concerning the trade generally.

The Court: What matters concerning the trade generally?

Mr. Kester: Well, as to the trade meaning of various terms.

The Court: What terms?

Mr. Kester: The quality provisions that we have been talking about.

The Court: You have already covered that by your stipulation. That is one of the things that the stipulation takes care of. He can testify as to the quality of these particular hops.

Mr. Kester: I didn't understand that we were to be precluded from offering evidence——

The Court: Three expert witnesses on a side,

(Testimony of H. A. Cornoyer.)

under the ruling of the Court. You have had three witnesses in the previous case as to what these contracts mean. By stipulation now that testimony has been made a part of the testimony in this case. [97] You see how it works?

Mr. Kester: I confess I didn't understand that applied to the definition of terms as well as to the quality of the hops.

The Court: I don't think we understand each other. Let's start over again. This man can testify as to the quality of these particular hops which we are trying now, Mr. Smith's hops. And two other people can testify to that besides Mr. Smith, the owner. Trade matters which are a matter of expert opinion have already been covered in the other case and that comes into this case. To be specific, you can't put three men on now in this case and three men in the case that follows it to say what "prime quality" means. You have already covered it on each side in the other case. If you put three more men in the case than that, you would have six experts, and then if you put three more in the case to follow you would have nine experts testifying on that point.

Mr. Kester: My only thought, your Honor—I am not arguing——

The Court: Go on and argue. Lots of people argue with me. Sometimes they have good luck.

Mr. Kester: My only thought is the witness may wish to explain what he is talking about as to

(Testimony of H. A. Cornoyer.)

these particular hops. Now, I don't want to transgress the Court's ruling. May he explain what he is talking about with respect to these hops?

The Court: We will get along all right so long as we have [98] the general understanding.

Q. (By Mr. Kester): I think you were telling us about your experience in the hop business, Mr. Cornoyer. You mentioned some of the persons or firms for whom you have been working in the hop business. Would you continue with that, please? You mentioned Wigan & Richardson. Are there any other buyers?

A. And numerous other people.

Q. Numerous others. Have you ever been involved in the grading end of the hop business?

A. Yes, sir.

Mr. Kerr: If your Honor please, we will stipulate as to the qualifications of this gentleman for testing, sampling and grading hops.

Mr. Kester: Very well.

Q. Mr. Cornoyer, have you had an opportunity to examine the seven samples which are here in the courtroom and, I believe, marked Exhibit 35, of the Kilian Smith 1947 cluster hops?

A. I have.

Q. Would you state whether or not, in your opinion, those hops are of the character that they would generally have been accepted under prime quality contracts in prior years in this vicinity?

A. No.

(Testimony of H. A. Cornoyer.)

Q. Would you state whether or not, in your opinion, those would be regarded as merchantable hops? A. Yes. [99]

Q. Would you describe the hops that you examined in these samples and explain what your opinion is predicated upon.

A. Well, the seven samples showed mildew.

Q. Would you describe the samples generally with respect to the other factors that enter into their appearance.

A. Were it not for the mildew I am of the opinion that they would be primes.

Q. Now, with regard to the mildew that you say appeared on them, did you make observations with respect to whether that mildew was of such a character that it would go into the core of the hop and affect the lupulin content?

A. I didn't find it as such.

Q. You didn't find that it affected the lupulin?

A. No.

Q. Is the matter of mildew as it affects hops usually a matter of the degree to which it appears on the hop? A. Yes.

Q. If it appears only to the extent that it discolors some of the petals but does not go into the core of the hop, does that affect the lupulin content or quality?

A. I don't know. I am not a chemist.

Q. As it is generally known in the hop business, is it generally regarded that mildew merely on the outer petals of the hop has any effect on the lupulin

(Testimony of H. A. Cornoyer.)

inside? A. Well, I don't quite know. [100]

Q. Your answer is No?

A. No, I don't quite know.

Q. Oh, I see. Pardon me. From your knowledge of the hop business generally and the purpose for which hops are bought and sold, what is the quality of the hop which makes it of use in the brewing of beer?

A. I can't answer that question. I am not a brewmaster.

Q. Do you know from the trade generally what the valuable part of the hop is?

A. The lupulin.

Q. The lupulin. That is what gives the beer its characteristic flavor and aroma? A. Yes.

Q. Now, did you observe the lupulin content of the hops that you examined here in the courtroom?

A. I did.

Q. Did that appear to be of sufficient quantity and quality, as far as you could tell?

A. Yes, that is average. It was.

Q. Would you say that those hops were average for the year 1947? A. Yes.

Q. During the year 1947 were you engaged in the buying and selling of hops in the Salem vicinity?

A. I was.

Q. Could you tell us about how many bales of hops went through [101] your office in that connection, how many you handled?

A. Oh, about 2500.

(Testimony of H. A. Cornoyer.)

Q. Do you know about how many different contracts you had with different growers?

A. I think I had sixteen contracts.

Q. What was your observation of the extent of mildew in the Willamette Valley in 1947?

A. I think the majority of the hops showed mildew or a trace of mildew in '47.

Q. What would you say with respect to the number of yards in the Willamette Valley in Oregon that had some mildew?

A. I didn't visit all the yards.

Q. Well, among those that you saw what would you say?

A. Well, I just said that better than half of them showed mildew or a trace of mildew. I don't know just exactly how many yards. The largest section was Independence. I was familiar with that. I think every yard in Independence showed mildew.

Q. Generally speaking, were the hops from those yards accepted in the trade and bought and sold?

A. Well, I don't know. I think most of them were sold at possibly a reduction.

Q. From your knowledge of the hop business would you say that most of the 1947 cluster crop had been disposed of?

A. You mean sold?

Q. Yes.

A. No, there is probably between six and seven thousand bales in growers' hands at the present time.

Q. What was the production in 1947?

A. Well, around 80,000 bales.

(Testimony of H. A. Cornoyer.)

Q. So that somewhere over 70,000 of those bales have been sold up to this time? A. Yes.

Q. Would you say that out of those 70,000 bales probably the majority had some traces of mildew in them? A. Yes.

Q. Now, is it a fact that the mere presence of a slight trace of mildew on a hop cone automatically makes that hop not a prime hop?

A. That is my understanding.

Q. That the slightest trace of mildew on a hop will prevent it from being a prime quality hop?

A. According to my understanding, yes.

Q. Would it, nevertheless, be bought and sold and used in the manufacture of beer?

A. Yes. The mere fact that some of them are bought or accepted under a prime contract does not necessarily mean that they are prime hops.

Q. Would you say that the mere presence of a slight trace of mildew on a hop would mean that that was not a good, merchantable [103] hop?

A. No, no; it is merchantable.

Q. It could be a good, merchantable hop, even though——

A. It could be a good, merchantable hop.

Q. Even though it had some mildew on it. Did you ultimately take all of the hops that you had contracted? A. All but one crop.

Q. Did you ultimately take that?

A. Yes, I ultimately took that, and I settled with the grower.

Q. And made a reduction in price on that?

(Testimony of H. A. Cornoyer.)

A. Yes.

Mr. Kester: I think that is all.

Cross-Examination

By Mr. Kerr:

Q. I understand, then, that you did reject some of the 1947 crop? A. One crop.

Q. Why did you reject it?

A. On account of mildew.

Q. I believe you stated that these hop samples which you examined are average for the year 1947?

A. Oh, I would say yes.

Q. Average for what, Mr. Cornoyer?

A. What? [104]

Q. An average of what, an average of the crop where? A. In Oregon in 1947.

Q. Did you include Grants Pass in that?

A. Well, I wasn't down to Grants Pass.

Q. By Oregon do you mean the Willamette Valley? A. Yes.

Q. Did the Yakima area, to your knowledge, produce an average crop in '47 that was of a high quality? A. I wasn't in Yakima.

Q. You don't know what they produced?

A. No, I don't know anything about Yakima.

Q. How about California?

A. I don't know anything about California.

Q. Does the mildew damage on hops affect the color of the hops? A. Yes.

Q. How does that color show up in the hops?

A. Well, it is red, has a reddish cast.

(Testimony of H. A. Cornoyer.)

Q. Are hops which are affected by that reddish mildew, reddish color, a good color?

A. Beg pardon?

Q. Is that a good color?

A. No, that is not a good color; that is, not according to my definition of a prime hop.

Q. You believe that your definition of a prime hop is the definition generally applied in the trade?

A. I believe so.

Mr. Kerr: That is all. Thank you.

Redirect Examination

By Mr. Kester:

Q. One more thing, Mr. Cornoyer. As I understand it, the only thing wrong with these hops, in your opinion, was that they had some mildew on them; is that correct? A. That is right.

Q. But that mildew was not of such a kind as to affect the lupulin; is that right? A. Yes.

Mr. Kester: That is all.

Recross-Examination

By Mr. Kerr:

Q. Was that mildew damage readily apparent upon looking at the hops? A. Beg pardon?

Q. Can you see that mildew damage when you look at the sample? A. Yes.

Mr. Kerr: That is all. [106]

Redirect Examination

By Mr. Kester:

Q. One more thing. Is it customary in the hop business to make a separation of a hop sample and

(Testimony of H. A. Cornoyer.)

try to pick out those hop cones which on microscopic examination do not show the slightest trace of mildew from those which show a trace of mildew?

A. Oh, not necessarily. If there is plenty of them in, why, you don't go to all that trouble.

Q. Did you ever hear of a test being made such as Dr. Hoerner testified to here in court the other day? A. No.

The Court: He said himself none had ever been made before. Call another witness.

(Witness excused.) [107]

WILBERT AMAN

was thereupon produced as a witness in behalf of the Plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kester:

Q. Would you state your name, please?

A. Wilbert Aman.

Q. Where do you live, Mr. Aman?

A. Mt. Angel.

Q. Are you engaged in the hop business?

A. Yes.

Q. Do you raise hops? A. Yes.

Q. How large a place do you have?

A. Well, I rent my father's hopyard there. We have fifty-two acres in hops.

Q. Fifty-two acres in hops? A. Yes.

Q. Do you have both fuggles and clusters?

(Testimony of Wilbert Aman.)

A. Yes.

Q. Were you raising hops in 1947?

A. Yes.

Q. How long have you been in the hop business?

A. Well, I have been engaged in the growing of hops since 1932.

Q. Have you raised hops continuously since that time? [108] A. Yes.

Q. Have you had occasion to be familiar with the hops grown and raised in the Willamette Valley generally during that time?

A. Well, quite a little.

Q. Have you examined other crops and samples of other people's crops during that time?

A. Well, I have some. I have seen hops from that district there and some of these other districts.

Q. Did you have occasion to see Mr. Kilian Smith's hopyard during the growing season of 1947?

A. Yes, I have seen it. Oh, I think it was about somewhere near the middle of August.

Q. Near the middle of August. Do you recall now whether the fuggles had been picked or were they still being picked about that time?

A. Well, they just finished picking the fuggles, I think, that day.

Q. Did you go around and look through the cluster part of the hopyard?

A. Yes, we drove down through the yard, down through the late yard.

(Testimony of Wilbert Aman.)

Q. Did you at that time observe the presence of mildew in Mr. Smith's clusters?

A. Yes, I did.

Q. Had you observed the presence of mildew in other hop crops [109] that season?

A. Yes, quite a little. It seemed to me that there was quite a little around through——

Q. Did you, for instance, have mildew in your own hops that year?

A. Yes, we were affected very severely that year.

Q. How would you characterize the mildew in Mr. Smith's yard, as to whether it was much or little or average or what?

A. Well, I don't think it was as severe as it was in a lot of cases or yards that I had seen.

Q. Did you have occasion to go back again at any time to his place? Did you see his crop any more after that?

A. No, not after that date.

Q. Did you have occasion to examine some samples of his hops?

A. Yes, I seen samples of his hops, I think, about three different times.

Q. Did you make an observation of those samples, to look at them and see what they looked like?

A. Yes.

Q. Did you observe the presence of mildew in those samples?

A. Yes.

Q. How did they compare with the general average of hops in the Willamette Valley that season?

A. Well, I think that they appeared a little

(Testimony of Wilbert Aman.)

better than the general average of the samples that I had seen. [110]

Q. How did they compare, for instance, with your own hops?

A. Well, ours were very severely affected, and there were a lot of these what they call nubbins and undeveloped hops in there, and quite a lot of red ones in.

Q. In your own yard? A. Yes.

Q. Did you dispose of your own crop?

A. Yes we had a contract on them.

Q. Whom did you have a contract with?

A. Well, it was with J. W. Seavey.

Q. What kind of a contract was it?

A. Well, it was similar to this one, similar to the one in this case here. The only thing, it was a regular straight contract. It didn't have any advance in price.

Q. It had a fixed price and not a market price contract? A. Yes.

Q. What was the fixed price for your hops?

A. This was made a little earlier in the season, and I think it was made somewhere around the first of June. It was made at 45 cents based on an 8-per cent picking.

Q. Around the first of June did it look like 45 cents was a pretty fair price?

A. At that time there was practically no mildew; that is, it didn't show up at all, and it looked like it was.

Q. At the time your crop was contracted did it

(Testimony of Wilbert Aman.)

look as though [111] there was going to be a large crop of hops in '47?

A. It did look like there was going to be quite a big crop at that time.

Q. Did Seavey subsequently take your crop of hops? A. Yes, he took them all.

Q. Would you say that they had more mildew in them than Smith's did?

A. Yes, they were quite severely affected.

Q. About when did he take yours in, do you recall?

A. It was about the 13th of October, I think; somewhere in there.

Q. Were those clusters like Kilian's?

A. Yes, they were late clusters.

Mr. Kester: I think that is all.

Cross-Examination

By Mr. Kerr:

Q. Did any of the hops in these growers' yards you saw in 1947 appear to be badly infested with mildew?

A. Well, not that I could see. I think they were all harvested that I know of.

Q. You don't know of any grower that failed to harvest his hops because of mildew?

A. Not in that district over there.

Q. Do you know of any grower in the Willamette Valley that did not harvest his '47 crop because of mildew infestation? [112]

A. No, I can't say that I do. There was some that maybe left part of them, but they picked the

(Testimony of Wilbert Aman.)

best ones, maybe, and left parts of the badly infected ones.

Q. Did you say that the market price for cluster hops, Oregon clusters, in early 1947 was 45 cents?

A. That is what the contract price was at that time. That is what they were contracting for about that time.

Q. Was that about the market price?

A. Well, that was on futures; yes, future contracts.

Q. To your knowledge did the futures contract price go up after that?

A. Well, it was shortly after that, why, we got this about an infestation of mildew, and the market gradually went up to—jumped up to 50 and 55, on up to—

Q. Was that because the mildew threatened to reduce the quantity of good grade hops?

A. Yes, I think that was the reason.

Q. Would you say that because of the comparative shortage of prime quality hops resulting from mildew damage that the price for prime quality hops went up?

A. Well, I don't know if it was for prime quality hops that caused it to go up, but it was just the demand for the hops. Thinking that there was going to be a short crop, there would be a lot of brewers, I guess, that were getting a little worried about getting these hops, enough to make their brew.

Q. You say they were worried about getting

(Testimony of Wilbert Aman.)

enough. Do you mean getting enough good quality hops or getting just any hops?

A. Well, it seems just getting any hops, because a lot of these hops that they went out and contracted for at that time showed traces of mildew in them then on the vines.

Q. That is, there was mildew in the yards?

A. Yes.

Mr. Kerr: That is all.

Redirect Examination

By Mr. Kester:

Q. One more thing, Mr. Aman. Did you contract your fuggles separately from your clusters?

A. Yes, we sold the fuggles later on. That was, oh, I imagine about the middle of August.

Q. Were they under contract? A. Yes.

Q. I see. What did you get on your fuggles?

A. 92 cents.

Q. About what time was that?

A. Well, that was—we made that contract, I think it was, around the middle of August. They were based on this advance, one of these 85-cent open-end.

Q. That was an open-end contract, was it? [114]

A. Yes.

Q. So that you got to pick the market price?

A. Yes.

Q. Were your fuggles affected by mildew or anything?

A. No, not to my knowledge, that I could notice.

(Testimony of Wilbert Aman.)

They had a little wind whip in them, though; a little reddish color to them.

Mr. Kester: I think that is all.

(Witness excused.)

Mr. Kester: If the Court please, the other person that we had expected to call on quality is the chemist from Oregon State College who made the analysis of Mr. Smith's samples. Now he was to have been here at 1:00 o'clock today.

The Court: Put on another witness.

Mr. Kester: Well, with the exception of that, I have no further testimony. I understand we have used up our quota of experts under the ruling, and Mr. Bullis I suppose has been detained by the snow, because he apparently has not arrived here.

The Court: That ends your case subject to Bullis?

Mr. Kester: That is correct, except that if for any reason Mr. Bullis is not permitted to testify on that we could still be entitled to one other expert.

The Court: All right. Call a witness, Mr. Kerr.

LAMONT FRY

was thereupon produced as a witness in behalf of the Defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kerr:

Mr. Kerr: I presume it is unnecessary to iden-

tify this witness, inasmuch as the record in the other case already shows who he is.

Q. Mr. Fry, did you negotiate with Kilian Smith in 1947 with regard to purchasing his late cluster hops? A. I did.

Q. Will you state when that occurred and what you did in that connection?

A. It was about August 17th that I had signed him on a sales slip and purchased his hops. Fuggles and clusters, I think they were. I know it was clusters.

Q. What was the nature of those sales slips?

A. Well, it was the regular spot sales slip used for the purpose of description, money advanced, and so forth, in order to put that information on the contract for him to sign later.

Q. Had Mr. Paulus told you to take sales slips out to Mr. Smith's place? [116]

A. No, he didn't know that I was making the deal that day. I had orders to buy and Mr. Smith agreed to sell.

Q. At that time what was the discussion between you and Mr. Smith concerning his cluster crop?

A. Well, he wanted to know if he had mildew in whether they would accept the crop, and I told him there was no hops accepted on the vine, and he insisted on my looking at them, so we went down in the yard to look at them.

Q. This was the first time you had been at his yard, was it?

A. This was the first time I had ever seen his

(Testimony of Lamont Fry.)

hops. I had talked to Mr. Kilian Smith before that, yes, quite a few times.

Q. Did you go down into his cluster yard at that time? A. We did.

Q. Did you look at those cluster hops?

A. Yes.

Q. How far along developed were they?

A. Well, the hops that would form—or that the mildew didn't blight to the extent of killing were already formed. They were not ripe, however. In other words, the lupulin wasn't filled out to the degree of being ripe, but the cone itself was filled; I mean, in size it had filled.

Q. Was this a late attack of mildew?

A. This attack came around July and August, the latter part of July and the first of August, I imagine, from what he said. [117]

Q. How heavy a mildew infestation did you note at that time?

A. Well, that is hard to explain. However, some of the hills of hops had all dried up and had died. What was left was quite red. But other hills were clean, and some hills had—the tops of the hops would be red where the hops on the bottom of the vine would be green. And it was generally throughout the yard that way. That is why we walked all through it.

Q. Did you note generally throughout his yard substantial quantities of hops which were not affected by mildew?

(Testimony of Lamont Fry.)

A. Oh, yes. That is what we were basing our estimate of the crop on.

Q. That is, you were basing your estimate of the crop on what?

A. On the green hops that were left.

Q. That is, hops not affected by mildew?

A. That is right.

Q. How was the set of the hops as a whole at that time? Was it heavy?

A. Very heavy, yes.

Q. That would include the mildew-infected hops?

A. That is right. In estimating the yard, the ones where the mildew had taken it, being heavy vines, I assumed it would have been very heavy if the attack had not taken that particular vine.

Q. The contract, I believe, which is Exhibit 1, places an estimate of 10,000 pounds on the crop of clusters that year. [118] Was that estimate suggested to you by Mr. Smith or was it your estimate?

A. That was an estimate that was agreed upon between both of us, that that is about what he would be able to pick of decent hops.

Q. By "decent hops" you mean what?

A. Well, green hops. Let's put it that way.

Q. Was that the estimate of the hops which would come up to contract quality?

A. The hops hanging there—I couldn't tell what they would be, because I didn't know what he would pick or what he would bale or dry or anything. I am speaking of the green hops hanging on the vine now; not of prime hops in the bale, which I know nothing about until they get in the bale.

(Testimony of Lamont Fry.)

Q. Was it possible at that time to make any determination of what the hops would be like when they were in the bale?

A. No, because I didn't know what he was going to pick.

Q. Did you and Mr. Smith at that time discuss selective picking of the crop?

A. Oh, yes. That was understood, that he wouldn't pick any mildew, naturally.

Q. How long do you think you were out at his yard at that time?

A. Oh, a half or three-quarters of an hour, I imagine, walking through the yard.

Q. Have you related to the Court the full conversations between [119] you and Mr. Smith on that occasion relative to mildew infestation of his yard?

A. Most of it. He asked me if we would accept the hops or if we would accept hops. I told him he would have to pick them and then we would be able to tell that, depending on what he did to them. There is no way for me to accept or reject the hops——

Q. Have you ever been authorized by Mr. Paulus to accept hops for Mr. Paulus or for Hugo V. Loewi on the vines? A. No.

Q. Did you go back to Smith's yard at a later time?

A. Yes, when I took a check out, after he had started picking two or three days.

Q. Do you recall about when that was?

A. Why, I think that was the latter part of Sep-

(Testimony of Lamont Fry.)

tember—I mean August, is what I think it was.

Q. The latter part of August?

A. I think that is when it was.

Q. Was he picking his cluster crop then?

A. Yes, he had been picking two or three days.

Q. What check was it that you took out to him at that time?

A. Well, it was his advance check that was filled out of the moneys that were to be entered in the contract. I was supposed to enter the moneys when we decided what was to be advanced.

Q. Were those advances under the cluster or fuggle contract? [120] A. The clusters.

Q. The cluster contract. Did he tell you how much money he would need for picking?

A. We agreed to all that. It seemed, though, after he had picked a while, he had to raise the price of picking, so I think the check reads \$3,000.

Q. How did you arrive at that figure of \$3,000?

A. Well, if my memory serves me right, we arbitrarily agreed on that on account of him paying more than 3½ for picking.

Q. Was that the figure that he requested?

A. Oh, it has to be a meeting of minds or we wouldn't be able to make the deal, so I imagine he requested that and we agreed upon it, or talked about it.

Q. Did you talk at that time with Mr. Smith about the appearance or condition of his cluster hops?

(Testimony of Lamont Fry.)

A. Only generally in this way: That they looked pretty much like they had before. There hadn't been any change particularly in his hops, but the only remark that was made, we looked at a few baskets of hops and walked around into his yard, and then I cautioned him on his picking and his trying to be careful to pick all the red hops out he could. He said he would, and then I left.

Q. Did he at that time ask you if you would accept the hops?

A. Oh, yes. He tried to pin me down again whether I would accept the hops. [121]

Q. What did you tell him at that time?

A. I told him I had no way of accepting the hops. I never accepted hops in the field. It was up to him. If he had the best hops with no mildew, he could still ruin them between the field and the bale, so naturally I couldn't accept any hops under those conditions.

Q. At the time of this second occasion when you were in his yard were there still substantial quantities of cluster hops which you noted were not as yet affected by mildew?

A. They were approximately the same as they had been before.

Q. Did he have any cluster hops baled at that time? A. No.

Q. Did he have any in the kiln?

A. He had about 25 sacks dumped out on the kiln floor.

Q. Did you look at those? A. Yes.

(Testimony of Lamont Fry.)

Q. Did you note their appearance?

A. About the same as they were in the baskets in the field.

Q. What was that appearance?

A. They were a little rough in picking, and he had quite a few red ones in there, the same as I had told him when we were in the field, cautioning him about picking them in that way.

Q. Did you at that time warn him about picking the red hops?

A. Oh, yes. We didn't go into details because, after all, he is the one that is picking. He bosses his own yard, and he was [122] bossing his own yard.

Q. Did you at that time advise Mr. Smith whether or not he should pick his crop?

A. No, no.

Q. Did you at any time advise Mr. Smith as to whether or not he should pick his crop?

A. No, I had no authority to, nor did I.

Q. Did he ask you whether or not he should pick it?

A. Yes.

Q. What did he say to you about that?

A. He wanted to know if they would accept the hops. I told him I didn't know; I had no way of telling him.

Q. Were those the words he used?

A. That is right. He wanted to know if they would accept the hops—if they would accept the hops. That is what he was trying to get at.

(Testimony of Lamont Fry.)

Q. Did he ask you whether or not he should continue picking?

A. After I told him that I think not. I don't recall the exact words, no.

Q. You don't recall the exact words that he used?

A. About the continued picking. That is what I mean.

Q. You don't recall those exact words; is that right?

A. Only, "Will they accept the hops?" That is the point.

Q. At that time did he make any comments to you about the mildew damage? [123]

A. No, there was none outside of the accepted fact that it was there, the same as it had been before.

Q. Did he indicate to you why he was asking you whether or not you would accept the hops?

A. Well, he wanted me to put myself on record, I suppose, so that he would be sure to get his hops delivered.

Q. Did you tell him whether or not Hugo V. Loewi would accept the hops?

A. No. I had no way of knowing one way or another.

Q. Did you speak to Mr. Smith's drier on that occasion? A. Yes.

Q. What did you say to him?

A. I cautioned him about his drying, was all.

Q. Why?

A. Well, it seemed as though—I think, if my memory serves me right, we had some of his fuggles

(Testimony of Lamont Fry.)

—anyway, it was generally cautioning him on his drying. That was all. Maybe it was from the past, I knew he had some tough hops or slack hops before, and just a general caution.

Q. Were you out at Mr. Smith's at any time after this second visit you mentioned?

A. No.

Q. Those are the only two visits that you made to his yard; is that right?

A. To the hopyard itself, yes. [124]

Q. Did you later inspect the cluster yard, the cluster hops, in the bales? A. Yes.

Q. Did you take the tenth-bale samples?

A. Yes.

Q. Was Mr. Smith present when you took the tenth-bale samples? A. Yes.

Q. Do you recall when it was that you took those samples?

A. No. You have the date there on the weight tally. I believe it is around October 1st. I don't know.

Q. There is being handed to you Exhibit 13. I will ask you if you can tell from that the date on which you took the tenth-bale samples of the clusters? A. That would be October 3rd.

Q. That is the date on which you took the tenth-bale samples of the clusters?

A. That is right.

Q. Where were they taken?

A. In the Oregon Electric warehouse at Salem.

Q. Was Mr. Smith present at that time?

(Testimony of Lamont Fry.)

A. Yes, he was.

Q. Was anyone else present?

A. There may have been. I forget. Mr. Weathers might have been present, but I don't remember that for sure.

Q. Did you take any type samples of the Smith clusters before [125] the tenth-bale samples were taken?

A. Yes, twice.

Q. You took the type samples? A. I did.

Q. Where did you get those?

A. From his hops in the Oregon Electric warehouse.

Q. When did you take the type samples?

A. I don't know. I would have to refer to the records, but I imagine, oh, two or three weeks before that.

Q. That is, sometime before the taking of the tenth-bale samples of those clusters; is that right?

A. That is right.

Q. Was Mr. Smith present at that time?

A. No.

Q. In taking the type samples did you follow the customary procedure used in the hop trade?

A. Yes.

Q. And in taking the tenth-bale samples did you follow the same procedure that you have outlined in the previous case?

A. Yes.

Q. Prior to taking the tenth-bale samples did you present to Mr. Smith what is marked Plaintiff's Exhibit 5?

A. Yes.

Q. Will you state the circumstances surrounding

(Testimony of Lamont Fry.)

your presentation to Mr. Smith of that form of letter?

A. I don't remember whether this was in the office or at the [126] warehouse, but it was either one place or the other, and I told him that in order to inspect those that he would have to sign this agreement not holding us responsible and that this wouldn't constitute an acceptance of his hops. And he signed this, and then we went ahead with the inspection.

Q. Was the inspection; that is, the taking of the tenth-bale samples, after he had signed that letter?

A. Oh, yes.

Q. And by whose instructions did you obtain from Mr. Smith his signature to that letter?

A. Mr. Paulus instructed me to do this before we graded the hops or inspected them.

Q. What did you do with the hops after you took the tenth-bale samples? Were they weighed?

A. Yes, they were numbered and the hops weighed.

Q. Did you place any identification or mark upon the bales other than the bale numbers?

A. No.

Q. At the time that you took the tenth-bale samples did you have any discussion with Mr. Smith concerning the quality, condition or grade of his cluster hops?

A. Not to my memory, anything that would be of any concern, if we did.

(Testimony of Lamont Fry.)

Q. What did you do with the type samples that you took of his cluster hops? [127]

A. Took them to the office and in the usual way sent them East.

Q. That was whose office?

A. Mr. Paulus' office.

Q. By East you mean Hugo V. Loewi's?

A. Hugo V. Loewi's office.

Q. And were they handled in the same manner in which you customarily handled such type samples? A. They were.

Q. What did you do with the tenth-bale samples?

A. Well, wasn't that what you were speaking of, tenth-bale?

Q. No, I believe my previous question was with respect to the type samples.

A. Oh, the type samples were sent in in the usual way and also the tenth-bale samples.

Q. That is to say, you took the tenth-bale samples from the warehouse to Mr. Paulus' office; is that right? A. That is right.

Q. To your knowledge were they then sent East?

A. They were.

Q. What portions of them, if you know?

A. About three-fourths of them.

Q. That is, three-fourths of each sample?

A. Of each sample, of the tenth-bale samples.

Q. Did you at any time, Mr. Fry, have authority to accept [128] Mr. Smith's 1947 cluster hops?

A. No.

(Testimony of Lamont Fry.)

Q. Did you at any time have authority to accept any portion of those hops? A. No.

Q. Did you at any time tell Mr. Smith that you would accept any of those hops? A. No.

Q. Did you at any time tell Mr. Smith that Hugo V. Loewi, Inc., would accept any of those hops?

A. No.

Mr. Kerr: That is all, Mr. Fry.

(Thereupon an adjournment was taken until tomorrow, January 28, 1949, at 9:00 o'clock a.m.) [129]

(Court reconvened at 9:00 o'clock a.m., Friday, January 28, 1949.)

LAMONT FRY

a witness on behalf of Defendant, having been previously duly sworn, resumed the stand and further testified as follows:

Direct Examination

(Continued)

By Mr. Kerr:

Q. Mr. Fry, did you have occasion recently to deliver a sample of the Smith late clusters to Mr. G. R. Hoerner, at Oregon State College?

A. Yes.

Q. Do you recall when that was?

A. Wednesday or Thursday of last week.

Q. At whose direction did you make that delivery? A. Mr. Paulus.

Q. What sort of sample did you deliver to Mr.

(Testimony of Lamont Fry.)

Hoerner? A. I don't know what you mean.

Q. Where did you get the sample you delivered to Mr. Hoerner? A. From Mr. Paulus' office.

Q. Was that one of the tenth-bale samples that you drew from the Smith hops?

A. I am sure it was, yes.

Mr. Kerr: That is all. [130]

Cross-Examination

By Mr. Dougherty:

Q. Do I understand that you went out with Mr. Oppenheim in the middle of August, 1947, to examine hopyards in the Valley?

A. I think a day or maybe a day and a half, yes.

Q. Did any of the hopyards you examined have downy mildew? A. Yes.

Q. Did you negotiate this 1947 contract with Mr. Smith? A. I did.

Q. Did you have authority to negotiate it with him? A. I did.

Q. From whom?

A. Well, from Mr. Paulus.

Q. Did you have authority to agree on the floor price?

A. I had orders, yes, from Mr. Paulus.

Q. Will you explain that?

A. Well, he gave me orders that I could pay the floor price, such-and-such a price.

Q. To Mr. Smith?

A. To whomever I was buying from.

Q. You discussed the Smith deal with Mr. Paulus, did you not?

(Testimony of Lamont Fry.)

A. He knew that I was trying to buy his hops, yes.

Q. Did you have authority to agree on the estimated crop? A. Yes.

Q. When did you first see Mr. Smith in this connection? [131]

A. I think it was about August 12th. I am not so sure as to the date, but it was early in August.

Q. Was he then picking his fuggles?

A. I believe he was, yes.

Q. Was he then about finished picking his fuggles?

A. I think he finished picking his fuggles a day or so before the contract was signed, or the deal was made.

Q. At the time the deal was made had he finished picking his fuggles?

A. I would say he had, yes, or thereabouts.

Q. What did you talk about with Mr. Smith when you first saw him on about August 12th?

A. At that time we had an order for only fuggles and he wasn't interested in selling only fuggles, and the floor price wasn't high enough. Anyway, we didn't get together at that time.

Q. He wanted to sell his clusters along with his fuggles?

A. He said, "When the price comes up high enough I want to sell them both at the same time."

Q. He didn't want to sell his fuggles alone?

A. He didn't want to sell any hops at that time.

(Testimony of Lamont Fry.)

He said he would like to sell both because he knew I only had an order for fuggles at the time.

Q. You told him you only had an order for fuggles? A. That is right.

Q. What did you do after that conversation?

A. I went on my general work.

Q. I mean, in connection with this transaction?

A. Nothing, at that particular time.

Q. Did you go back and tell Mr. Paulus about it?

A. Mr. Paulus knew. I told him, I think, that he had some fuggles for sale, an overage on his contract, a prior contract, with Mr. Seavey.

Q. How about the clusters?

A. I might have mentioned them, just in a general way, yes.

Q. As a matter of fact, didn't you tell Mr. Paulus that Mr. Smith wanted to sell his clusters with the fuggles? A. I could have.

Q. Is it the fact that you did?

A. Well, I more than likely did. If I talked about one, I more than likely talked about the other, in general conversation.

Q. For the purpose of refreshing your memory, you remember when your deposition was taken in this case? A. Yes.

Q. Reading from Pages 2 and 3, you said, "He,"—referring to Mr. Smith—"had about 50 bales left, so he wanted to sell his clusters, too, and I only had an order for fuggles, so he said, 'Go back and see if you can get an order on clusters as well as

(Testimony of Lamont Fry.)

fuggles.' So I went back and talked to Mr. Paulus.'"

Is that correct?

A. That is right. That is what I said before.

Q. Did you subsequently get an order to buy clusters as well as fuggles? A. I did.

Q. Did you see Mr. Smith in the meantime?

A. I imagine I did, yes, but I wouldn't say where or any particular date, because it wasn't—we hadn't negotiated any deal until the time I seen his hop-yard and he signed——

Q. About what date was that?

A. I think the records will show, the files, but I think it was around the 17th or 18th.

Q. Around the 17th or 18th of August?

A. I think that is when the contract was signed.

Q. He had, then, finished picking his fuggles?

A. I think so.

Q. Did you examine his hopyard at that time?

A. Which one, the fuggles or the clusters?

Q. The cluster yard.

A. Before he signed that sales slip, I examined his yard, yes.

Q. Walked all through the yard, did you?

A. I did.

Q. Did the yard at that time have downy mildew? Did the yard at that time have downy mildew in it? A. It did.

Q. After having seen the yard, did you sign up Mr. Smith on a sales slip? [134] A. Yes.

Q. From your examination of the yard, is it a fact that you knew as a practical matter that the

(Testimony of Lamont Fry.)

yard could not be picked without showing mildew in baled hops?

A. Depending on how you could pick them. I imagine you could see that.

Q. As a practical matter, did you know that it could not be picked without showing mildew in baled hops?

A. I didn't know how it would be picked. I had no way of knowing. I never have had any experience in picking mildewed hops myself.

Q. You are, yourself, not experienced in picking hops, is that correct?

A. I never had any experience in picking mildewed hops of that type.

Q. For the purpose of refreshing your memory, Mr. Fry, in the same deposition that we are speaking of—I now read from Page 26—at this time you were speaking of the subsequent conversation you had with Mr. Smith: “Naturally there were red hops in there and if they didn't pick any more—put in any more than he could help in there—because, after all, he knew the contract and he was supposed to pick decent hops.”

When you say “Naturally there were red hops in there” what did you mean by that?

A. I was going to ask that question, wasn't that in the deposition [135] where we were talking about looking at these hops when they were picked in the basket?

Q. Yes.

(Testimony of Lamont Fry.)

A. That is what they were. I seen them. I admit I seen those hops in the basket.

Q. What did you mean by "Naturally there were red hops in there"?

A. Well, evidently I meant the fact they were in there and I was admitting that they were in there at the time.

Q. Did you mean you knew that the yard could not be picked then without showing red hops in the pickers' baskets?

A. I don't think I mean that because I didn't say that.

Q. After you examined his yard, after he finished picking the fuggles and you signed him up on the sales slip, when was the next time you saw his yard? A. At picking time.

Q. Do you recollect about what date that was?

A. Around the 25th. I think the records will show the date. I brought the check out to him.

Q. You brought a check out to him?

A. I did.

Q. Let's go back for a moment to on or about August 18th when you signed him up on a sales slip. Did you give him a check at that time?

A. No. [136]

Q. This was on or about the 27th; is that the first check you gave him?

A. That is the only check I gave him, to my knowledge.

Q. And he had then finished picking his fuggles?

A. I think he had. I will say that he had.

(Testimony of Lamont Fry.)

Q. On the 27th, now?

A. Oh, yes. He had finished then, yes.

Q. So you knew that the check you were giving him for advances was a picking advance on the clusters? A. That is right.

Q. Was that check fully filled out when you took it out? A. No.

Q. What was blank on it? A. The money.

Q. The amount of money?

A. That is right.

Q. Did you have authority to fill in the check?

A. I did.

Q. Did you at that time, before giving him the check, walk out into the yard? A. Yes.

Q. Did you look in the pickers' baskets?

A. I did.

Q. Did you see red hops in there?

A. I did. [137]

Q. Did you give certain instructions about his drier? A. I did.

Q. Did you at that time tell Mr. Smith that you would look at his hops and if they were about the same as they had been before you would give him the advance? A. I think I did.

Q. That is what you told him, is that correct?

A. I think it was.

Q. Were they about the same as they had been before?

A. They were about the same they were at the time the contract was made.

Q. Did you give him the advance?

(Testimony of Lamont Fry.)

A. I did.

Q. I believe the contract called for an advance of \$2500? A. Yes.

Q. How was that computed?

A. I think that advance shows 25 cents a pound on 10,000 pounds.

Q. How much did you give him, actually?

A. \$3000, the check shows.

Q. How was that computed?

A. That could be from the fact we was paying 5 cents a pound at that time instead of 3½.

Q. Could that have been because your estimate of the crop went up?

A. No, I don't think so. I don't think there was any estimate, [138] only the hops looked like they had before, and he could have picked 35 bales or he could have picked 60 bales or he could have picked 70 bales, depending on what he wanted to pick himself.

Q. You saw the hops in the pickers' baskets?

A. I did.

Q. You saw the hops in the drier?

A. I saw 25 sacks, approximately.

Q. And you knew how he was picking?

A. I did.

Q. You gave him an advance for \$3000?

A. Yes.

Q. Did you subsequently weigh in his hops at the Oregon Electric? A. Yes.

Q. You are the one who took the type samples and tryings and the tenth-bale samples, is that correct? A. That is right.

(Testimony of Lamont Fry.)

Q. Did the tryings and the tenth-bale and type samples all correspond?

A. The tenth-bale samples corresponded pretty close to the—or the tenth-bale samples to the type samples, yes.

Q. Did you accept or reject any bale at the time you inspected them?

A. No, I didn't accept or reject any bales. I told him to take two bales home and put a little heat under them; they had too [139] much moisture in them.

Q. They were subsequently put on the weight slip, is that correct?

A. Mr. Byers put those on.

Q. Did you ever have any authority to either accept or reject any of those hops, Mr. Smith's hops? A. No.

Q. Even at the time you inspect them, is that correct? A. That is right.

Q. Mr. Fry, if hops are inspected, graded, and weighed in, is that considered an acceptance in the hop trade?

A. Usually if they are marked, yes.

Q. Ordinarily, when they are run over the scales?

A. Depending on what you run them over the scales for ^{him} in!

Q. Why did you have Mr. Smith in this case sign this written form to weigh in his hops?

A. As I stated before, that was orders from Mr. Paulus.

Q. On or about August 27th, when you inspected

(Testimony of Lamont Fry.)

Mr. Smith's yard for the purpose of determining whether or not the hops were the same as they had been before, did you at that time instruct him not to pick? A. Not to pick?

Q. Yes. A. No.

Q. Did you at that time express any dissatisfaction concerning [140] the way his hops were picking? A. Yes.

Q. What did you say?

A. I told him they were too rough. I was afraid he was going to have a high quantity of stems and leaves.

Q. Did you tell him his picking was a little rough? A. Something to that effect.

Q. Something to that effect? A. Yes.

Q. Was that just the general conversation?

A. That was.

Q. What was your authority for filling in the amount of that check?

A. I based that on hops that had run bad or worse than they were, if there was a less amount of green hops than they were—that is what I based that on.

Q. Did you have authority to fill in that check, say, for \$5000?

A. Depends on whom I would be giving it to.

Q. You had general authority?

A. General authority, yes. Depends on what his yard is or who——

Q. After inspecting the yard you made an ad-

(Testimony of Lamont Fry.)

vance in a greater sum than called for by the contract?

A. Couldn't call it that because the contract said an estimate more or less. [141]

Q. Your estimate went up?

A. My estimate didn't go up. He asked for a little more money on account of the advances—on account of the higher cost of picking, and we just arbitrarily set it at \$3000, one way or the other.

Q. Why did you not fill it out for the figure set in the contract?

A. Because I imagine he wanted a little more money.

Q. Were the picking advances computed on an estimate of the crop?

A. I wouldn't say that for sure. I don't recall how we come to that figure.

Q. Do I understand then, you had authority to make such advances as you might deem necessary?

A. Yes.

Q. And at the time you made that advance you had seen Mr. Smith's picking in process?

A. I seen four or five baskets of hops, yes.

Q. And you had seen the hops in the drier?

A. No, not until after the advance was made.

Q. Immediately after the advances was made?

A. Yes.

Q. You knew that these advances would be used to pick the clusters, is that right?

A. I did, yes. [142]

Mr. Dougherty: Thank you, Mr. Fry.

(Testimony of Lamont Fry.)

Redirect Examination

By Mr. Kerr:

Q. Have you ever told a hop grower not to pick his hops? A. No.

Q. Have you ever had any authority to tell a hop grower not to pick his hops? A. No, sir.

Mr. Kerr: That is all.

Mr. Dougherty: That is all.

(Witness excused.) [143]

JAMES A. BYERS

was thereupon produced as a witness on behalf of Defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kerr:

Q. Will you state your name, please?

A. James A. Byers.

Q. Where do you live?

A. Salem, Oregon.

Q. What is your occupation?

A. An employee of C. W. Paulus.

Q. How long have you been employed by C. W. Paulus? A. Since the fall of 1943.

Q. In what capacity?

A. General office work and some outside field work.

Q. Did you take out to Kilian Smith ranch in 1947 the form of contract on his cluster hops?

A. I did.

(Testimony of James A. Byers.)

Q. Do you recall when that was?

A. I believe it was on the 19th day of August.

Q. Did you see Mr. Smith there at that time?

A. I did.

Q. How long did you stay at his ranch at that time? A. Oh, possibly half an hour.

Q. Were you in a hurry to get away? [144]

A. Yes.

Q. Did you look at his cluster hops?

A. No, sir.

Q. Did you go out into his yard?

A. No, sir.

Q. Did you have any conversation with Mr. Smith at that time about his hops?

A. No, sir.

Q. Or about any mildew condition of the hops?

A. No, sir.

Q. Did Mr. Smith say anything to you at that time about mildew infestation of his cluster yard?

A. I don't believe he did, no.

Q. Did Mr. Smith sign the cluster contract in your presence at that time? A. He did.

Q. You are being handed Defendant's Exhibit No. 1. Will you look at the signature of the notary public, the notary's certificate, on the reverse side of that and state whether or not that is your signature as notary public?

A. That is my signature.

Q. When did you next see Mr. Smith, if you remember?

A. It was possibly two weeks later.

(Testimony of James A. Byers.)

Q. What was the occasion?

A. As I recall it, I was in the general vicinity and I stopped [145] to see Mr. Smith relative to the closing of his contract, the floor price on his contract.

Q. Did you look at his hops at that time?

A. No.

Q. Did you go out into his hopyard?

A. No.

Q. Did Mr. Smith say anything to you at that time about mildew infestation of his cluster yard?

A. I don't recall all of the—I don't recall any conversation with him about it.

Q. Did you see Mr. Smith at Schwab's warehouse after that? A. Yes.

Q. When was that?

A. On the 24th of October.

Q. What was that occasion?

A. Mr. Smith stopped at the warehouse where I was working and asked me about taking in his hops.

Q. Which hops were those, fuggles or clusters?

A. At that time he asked me to take both fuggles and clusters.

Q. Were the fuggles and clusters in that warehouse at that time?

A. No, they were not.

Q. Were the fuggles in the warehouse at that time?

A. Not in Schwab's. They were in the Oregon Electric warehouse in Salem.

(Testimony of James A. Byers.)

Q. What was the discussion you had with Mr. Smith at that time [146] at Schwab's warehouse?

A. I advised Mr. Smith that I had authority to take in his fuggle hops, with the proviso that the advances on both the fuggles and clusters were to be deducted from the final payment.

Q. Did he ask you at that time to weigh in or take in his fuggle hops?

A. As I recall the conversation, he said he would have to think that over and would let me know.

Q. Did he at that time, before you had that conversation, ask you to take in his fuggle hops?

A. I don't believe he did, before that.

Q. Did he, on October 24th, ask you to take in his fuggles? A. Yes.

Q. You took in the fuggles after you made the statement you have just recited?

A. That is right.

Q. What did he reply when you told him that you would take in the fuggles if he would agree to deduct the cluster advances?

A. As I recall, he said he would have to think it over and would let me know the following day.

Q. Did he let you know the following day?

A. He did.

Q. Where were you when he communicated that, when he communicated with you?

A. At the Oregon Electric warehouse in Salem.

Q. Was that an oral conversation?

A. It was.

Q. What was the conversation?

(Testimony of James A. Byers.)

A. As I recall, it was along about 10:00 o'clock in the morning. I had just completed some other work on hops. I waited a while to see if Mr. Smith would show up. He finally showed up, I believe, about 10:30.

I again advised him we couldn't take the fuggle hops in without a deduction of the advances for both fuggles and clusters from the final payment, and he finally said, "Go ahead and take them in."

Q. Did you then inspect and weigh in the fuggles? A. I did.

Q. Was Mr. Smith present when you weighed in the fuggles? A. He was.

Q. What did you and Mr. Smith do after you had taken in the fuggles, after you had weighed in the fuggles?

A. After the fuggles were weighed, we went to Mr. Paulus' office, where I figured up the money due him and made out a purchase invoice and a check and handed them both to him.

Q. Did you at that time make out a check to Mr. Smith? A. I did.

Q. I hand you what has been marked Defendant's Exhibit 9 and ask you to state whether or not that is the check you have referred to? [148]

A. This *is* the check.

Q. And the amount of that check represents what, Mr. Byers?

A. The balance due Mr. Smith upon delivery of his fuggle hops.

Q. The Bailiff will hand you Exhibit 33-C. I

(Testimony of James A. Byers.)

will ask you whether or not the check which you have just referred to, that is, the amount of that check, was computed as indicated on that exhibit which has now been handed to you?

A. That is correct.

Q. Did you hand the check to Mr. Smith at that time? A. I did.

Q. Did he accept the check? A. He did.

Q. Did you have any further conversation with Mr. Smith at that time or at any other time concerning that check? A. I did not.

Q. Did you discuss with Mr. Smith at any time the rejection of his cluster hops?

A. No, I did not.

Q. Did you at any time accept the cluster hops of Mr. Smith? A. No, sir.

Q. Did you have any authority to accept the cluster hops of Mr. Smith? A. I did not.

Q. Exhibit 33-C lists 10,986 pounds of fuggles at 91 cents a [149] pound. Is that 91-cents-per-pound price the basis on which you computed the amount of the check? A. That is right.

Q. Was that the floor contract price for the fuggles? A. Yes, sir.

Q. So Hugo V. Loewi, Inc., did take in and accept the fuggle hops of Mr. Smith at the floor contract price, is that correct?

A. That is right.

Q. Was that the complete delivery of his fuggle crop? A. To my knowledge it was, yes.

(Testimony of James A. Byers.)

Q. That is the floor contract quantity, is that correct? A. That is correct.

Mr. Kerr: That is all.

Cross-Examination

By Mr. Dougherty:

Q. As I understand, Mr. Byers, you took out the contract for Mr. Smith to sign?

A. That is correct.

Q. He was already signed up on a sales slip, is that correct?

A. If my memory serves me right, he was, yes.

Q. Why did you take out the form of contract for him to sign, then?

A. The sales slip is merely a memorandum of agreement and contains more or less the information to be included in a contract. [150]

Q. Do I understand you to mean, Mr. Byers, that you have never bought and sold hops on the basis of such a sales slip? A. Spot hops, only.

Q. You have bought hops on the basis of such a sales slip? A. Spot hops, not contract.

Q. What made these contract hops rather than spot hops?

A. They are not spot hops until they are in the bale.

Q. Is it a fact that you had Mr. Smith sign the contract in order to get a chattel mortgage on your advances? A. That I don't know.

Q. As I understood it, you took the \$3500 check

(Testimony of James A. Byers.)

out with you when you had Mr. Smith sign the contract, is that correct?

A. As I recall, that is correct.

Q. You knew at that time, did you not, that Mr. Smith had finished picking his fuggles?

A. I didn't know, no.

Q. Did Mr. Smith so tell you at that time?

A. I found out when I arrived at his place.

Q. So, at the time you gave him that check you knew, did you not, that all the money would go into the clusters? A. Not necessarily, no.

Q. Will you please explain?

A. I didn't know that he had finished paying his pickers. He might have owed his pickers money yet.

Q. Didn't he so advise you at that time? [151]

A. I don't recall that he did.

Q. Did Mr. Smith at that time tell you that he would use this on his clusters, and that he had already paid for his fuggles?

A. To my knowledge, he didn't.

Q. Do I understand that at that time you knew that he had finished picking his fuggles?

A. Yes.

Q. Was it acceptable to you for Mr. Smith to use this \$3500 advance to pick his clusters?

A. Yes, sir.

Q. With reference to the time Mr. Smith asked you to take in his fuggles, would you please tell us again what you told him?

A. I advised Mr. Smith my instructions were

(Testimony of James A. Byers.)

that I couldn't take delivery of his fuggles without the agreement that I deduct the advances from both the fuggles and clusters from the final payment.

Q. When you speak of the advances on fuggles and clusters, as a matter of fact, it is true, is it not, you are talking about advances on clusters?

A. I am speaking of the advances made under the terms of the contract.

Q. The contracts which were signed after the fuggles had been picked, is that correct?

A. Will you state that again?

Q. Were those contracts signed after the fuggles had been picked? [152] A. That is right.

Q. Did you at that time tell Mr. Smith your instructions were—speaking now of the conversation about taking in the fuggles—that your instructions were not to inspect the fuggles unless he agreed to the deduction of all advances against the fuggles?

A. Not to take delivery of his fuggles, that is true.

Q. Would you have inspected them if he had not so agreed?

A. I don't believe I would have, no.

Q. So, then, as I understand it—Correct me if I am wrong, Mr. Byers—the balance of his fuggles was dependent upon the deduction of his cluster advances, is that correct?

A. That was the instructions I had.

Mr. Dougherty: Thank you.

(Testimony of James A. Byers.)

Redirect Examination

By Mr. Kerr:

Q. Is it the practice of the firm by which you are employed to require an accounting by the grower of his use of the advances paid to him under a term contract? A. No, sir.

Mr. Kerr: That is all.

(Witness excused.) [153]

C. W. PAULUS

was thereupon produced as a witness on behalf of Defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kerr:

Q. You are Mr. C. W. Paulus? A. Yes.

Q. Who testified in the previous case?

A. Yes, sir.

Q. Did you instruct Mr. Fry in 1947 to make an offer on the Kilian Smith cluster hops?

A. Yes.

Q. Did you authorize Mr. Byers to prepare the form of contract covering that sale? A. Yes.

Q. Did you authorize Mr. Byers to tender that form of contract to Mr. Smith for execution?

A. Yes.

Q. Did you authorize Mr. Fry to accept any of the cluster hops of Mr. Smith?

A. At which time, to accept any of the cluster hops?

(Testimony of C. W. Paulus.)

Q. At any time. A. Baled hops?

Q. I beg your pardon? A. Baled hops?

Q. Cluster hops, at any time?

A. I told him to negotiate the contract, to make the contract, but I didn't instruct——

Q. Did you authorize Mr. Fry to accept any of the Kilian Smith cluster hops? A. No.

Q. Did you authorize Mr. Fry to negotiate a contract with Kilian Smith for the purpose of his cluster hops on the vine? A. No.

Q. Did you authorize Mr. Fry to negotiate with Kilian Smith for the purchase of his hops at any time prior to the baling of those hops? A. No.

Q. Have you ever purchased any grower's hops while they are on the vine? A. No.

Q. That is to say, have you ever purchased any grower's hops as hops on the vine? A. No.

Q. Have you ever purchased any grower's hops other than as baled hops? A. No.

Q. Have you ever been authorized by Hugo V. Loewi, Inc., to purchase any hops other than hops in bales? A. No. [155]

Q. Were you authorized by Hugo V. Loewi, Inc., to purchase the Kilian Smith cluster hops as hops on the vine? A. No.

Q. Were you ever authorized by Hugo V. Loewi, Inc., to accept the 1947 Kilian Smith late cluster hops under the written contract covering those hops? A. No.

(Testimony of C. W. Paulus.)

Q. Did Mr. Byers return the signed Smith cluster contract to you? A. Yes.

Q. Was it signed by Mr. Oppenheim for Hugo V. Loewi, Inc., in your presence? A. Yes.

Q. Where did that occur?

A. In my office.

Q. In Salem? A. Yes.

Q. Did you at any time go out to Mr. Smith's late cluster yard in 1947?

A. Yes, following the harvest.

Q. When was that?

A. Approximately September 15th or thereabouts.

Q. What was that occasion? What was the occasion for that visit?

A. When I went out to see him about the possibility of purchasing [156] from him an additional quantity of his fuggle hops which were on the contract to Mr. Seavey.

Q. Will you explain that situation?

A. I had received word from Mr. Smith that there was some question about Mr. Seavey receiving the fuggle contract, which is a contract prior to the Hugo V. Loewi contract on the fuggles, and that Mr. Seavey had suggested to Mr. Smith to endeavor to dispose of the hops which were contracted to him, Mr. Seavey, and that was the information given to me.

Thereupon I telegraphed that information to Hugo V. Loewi, Inc., asking if they would be interested.

(Testimony of C. W. Paulus.)

In reply I received instructions from Mr. Oppenheim that he would consider taking an offsetting amount of these fuggle hops in place of the cluster hops at the 91-cent price.

Q. Was that before or after the rejection of the cluster hops? A. That was before.

Q. What was the date of this visit by yourself to Mr. Smith's yard?

A. I can't say exactly. It is something around the 15th of September or about the middle of September.

Q. What did Mr. Smith say to you at that time concerning that possible transaction?

A. He gave it consideration but subsequently decided not to accept that proposal.

Q. Did he later tell you he would not accept that proposal? [157] A. Yes.

Q. Was that in writing or by telephone or orally? A. Orally.

Q. Where was that that he told you he would not accept it?

A. I don't recall whether it was over the telephone or in my office.

Q. Then the proposal you are referring to was a proposal that Hugo V. Loewi, Inc., buy, at 91 cents a pound, a quantity of Kilian Smith's fuggle hops in substitute for a quantity of cluster hops?

A. That is right; approximately 15,000 pounds.

Q. Did you know at that time whether or not Seavey had a chattel mortgage on these fuggle hops?

(Testimony of C. W. Paulus.)

A. I didn't know, but I assumed he had. He had a contract.

Q. Your proposal was made notwithstanding the assumption that there was such a chattel mortgage on the fuggles? A. Yes.

Q. Did you receive at your office in Salem type samples taken of the Kilian Smith cluster hops in 1947? A. Yes.

Q. What was done with those samples?

A. They were re-packaged and sent to Hugo V. Loewi in New York City.

Q. Did you receive the tenth-bale samples which later were taken from the Kilian Smith late clusters in 1947? [158] A. Yes.

Q. What was done with those samples?

A. Likewise, they were prepared and re-packaged and sent to Hugo V. Loewi in New York.

Q. What portion of the type sample was sent to New York?

A. Approximately two-thirds to three-fourths of it.

Q. What portion of each of the tenth-bale samples was sent to New York?

A. Approximately the same.

Q. There will be handed you Exhibits 43, 45, 46 and 47.—43, 45-A, 46 and 47, rather. Were those made out in your office? A. Yes.

Q. What does each of those show with respect to the sending to the New York office of Hugo V. Loewi, Inc., of the samples of Kilian Smith 1947 late cluster hops?

(Testimony of C. W. Paulus.)

A. Exhibit 43 shows the transmittal of two samples of Lot 64, Kilian Smith clusters, 73 bales, by express to Hugo V. Loewi, Inc.

Q. On what date?

A. On September 10th.

Q. Can you state of your own knowledge whether or not the lot number which was assigned by your office to the Kilian Smith late cluster hops 1947 was No. 64?

A. Yes.

Q. The next exhibit refers to what? [159]

A. That refers to Kilian Smith late cluster hops, Exhibit No. 45-A, which is dated September 10th, showing the transmittal of one sample of Lot 64 taken from 73 bales of the Kilian Smith late cluster hops, 1947 crop, by air express, to Hugo V. Loewi, Inc.

Q. Were those type samples?

A. Yes.

Q. The next exhibit?

A. Exhibit 46 is dated September 20th and shows the transmittal of five samples of Lot 64, taken from the 73 bales of the Kilian Smith 1947 cluster crop, transmitted by air express to Hugo V. Loewi, Inc.

Exhibit No. 47, dated October 4th, 1947, shows the transmittal of seven samples taken from Lot 64, 73 bales of Kilian Smith 1947 clusters, being the tenth-bale inspection samples of Lot 64, which were sent to Hugo V. Loewi, Inc., by parcel post.

Q. There will be handed to you Exhibit 22. Is that a carbon copy of a letter addressed to Hugo V. Loewi, Inc., on the date shown thereon?

(Testimony of C. W. Paulus.)

A. Yes. This is an office copy of the letter addressed to Hugo V. Loewi, Inc., under date of September 20th.

Q. What occasioned your sending that letter to Hugo V. Loewi, Inc.?

A. The receipt by me of several letters and telegrams from [160] Hugo V. Loewi, Inc., in connection with the Kilian Smith cluster hops.

Q. There will be handed to you Exhibit 31. Will you explain the situation referred to in that telegram, or copy of a wire? Is it not addressed by you to Hugo V. Loewi, Inc.?

A. Yes, dated October 22nd.

Q. What was the reason for your sending that wire?

A. Reporting Mr. Smith's announcement that Mr. Seavey had not received his 20,000-pound fuggle crop and advising that both Seavey and Smith were interested in selling that 100-bale quantity of fuggle hops and, therefore, is interested in the purchase by Hugo V. Loewi, Inc., of these fuggle hops and it says: "He is still interested sell these hops since Seavey delivery appears doubtful and buyer encourages sale. Your purchase these hops may ease settlement your cluster advances and also expedite delivery your fuggle contract and shipment which now delayed pending Seavey action."

Q. Did you instruct Mr. Fry to obtain from Mr. Smith a signed agreement that Hugo V. Loewi, Inc., might inspect and weigh Mr. Smith's 1947 late clus-

(Testimony of C. W. Paulus.)

ter hops, without such being considered as an acceptance of those hops? A. Yes, sir, I did.

Q. Why did you give Mr. Fry those instructions?

A. For the reason that prior to going through these hops I had received information from Hugo V. Loewi, Inc., that it was very [161] doubtful that they would accept the hops, and to go through the hops and inspect them and not weigh them, because if at some later date the hops *would* accepted, for one reason or another, if they were weighed in at that time it would duplicate the effort, and we thought we would weigh them merely at that time and then they could be stacked back there and, should the hops be rejected and later purchased, that job would be accomplished, so we decided to proceed on that basis, getting Mr. Smith's stipulation in a letter that the inspecting, marking and weighing would not constitute an acceptance, and that was directly understood by Mr. Smith. .

Q. What do you mean by "marking?"

A. Marking the bales on the head, the number on the head.

Q. Did you authorize Mr. Fry or anyone else to place any marks other than such numbers on such bales? A. No, I did not.

Q. Did you discuss that with Mr. Smith prior to instructing Mr. Fry to obtain such agreement?

A. Yes. I did personally, in my office.

(Testimony of C. W. Paulus.)

Q. Was Mr. Smith present in your office when you discussed the matter?

A. Yes, I discussed it with him in my office.

Q. What was your discussion, if you recall?

A. The explanation, as I have just stated, that we wanted to take tenth-bale samples and inspect his lot and send those [162] samples, those inspection samples, back to Hugo V. Loewi, Inc., for their final decision, and in order to expedite any subsequent purchase or possible delivery, to have the bales weighed all in the same operation but, prior to doing that, I had to have his—I told him I wanted a stipulation that it did not mean acceptance since I had no instructions to receive the hops at that time.

Q. Did you tell Mr. Smith at that time that you had been informed by Hugo V. Loewi, Inc., that samples of the late cluster hops previously submitted showed unsatisfactory quality or condition?

A. Yes.

Q. What did Mr. Smith say when you told him that you would have to get such an agreement from him?

A. He agreed that that was in order.

Q. Did he state that he would sign such a statement?

A. Yes.

Q. Did he offer any objection at all to signing such a statement?

A. No.

Q. Did he make any comment to you at the time you told him of the advice from Hugo V. Loewi, Inc., that the samples previously submitted were not favorable?

(Testimony of C. W. Paulus.)

A. I don't recall what his statements were. We discussed the matter on several occasions. I can't distinctly recall definite statements made by him.

Q. Do you recall whether or not that was the first time that you told him that the reports from Hugo V. Loewi, Inc.'s office were unfavorable on those hops?

A. No, I am sure that it was discussed with him prior to the time of his signing this stipulation.

Q. Do you recall such prior occasions?

A. Yes, I can recall several times Mr. Smith was in the office.

Q. When were those times, if you recall?

A. I can't recall the dates, but I remember Mr. Smith was up in our office one evening when we were wrapping samples, and he was discussing the matter of the possible acceptance of his hops.

Q. Was that referring to his clusters?

A. Clusters, yes, and I can recall another time prior to the time he signed this when Mr. Smith was in the office.

Q. At the time you referred to as being when the samples were examined, what was the conversation with respect to possible rejection of the hops?

A. The report was made to Mr. Smith that Hugo V. Loewi, Inc., did not like the cluster hops based upon their examination of the first samples submitted.

Q. Was that report made to Mr. Smith by you personally?

A. Yes.

(Testimony of C. W. Paulus.)

Q. Was there any previous occasion when you gave him such a report?

A. I may have written Mr. Smith a letter on that. [164]

Q. Do you recall any telephone conversation with him on the subject?

A. I can't recall any particularly to mind right at this time.

Q. Did you direct or instruct Mr. Byers not to pay for Mr. Smith's fuggle hops without a deduction of all advances made both on the fuggles and clusters?

A. I will answer your question in this manner, that at the time the office received the telegram from Hugo V. Loewi, Inc., on that particular phase of the transaction, namely, to receive only the Smith fuggle hops, or fuggle contract of 59 bales——

Q. What do you mean by fuggle contract?

A. To receive the hops under the fuggle contract, namely, 59 bales. I was in Yakima and the subject contained in the telegram was transmitted to me by telephone by Mr. Byers, and over the telephone I instructed him to contact Mr. Smith and advise him of the contents of the proposal made by Hugo V. Loewi, Inc., namely, to inspect the hops and pay for the same provided all the advances made under the fuggle and cluster contracts be deducted.

Q. You will be handed Exhibit No. 17. I will ask you whether or not that is at least one of the wires received on that general subject?

(Testimony of C. W. Paulus.)

A. This is one of the telegrams received from Hugo V. Loewi, Inc., on the subject of the Kilian Smith cluster hops.

Q. Will you read the portion of the wire specifically relating [165] to the deduction of cluster advances in settlement for the fuggles?

A. Yes. The telegram in that respect reads: "Notify grower we refuse to accept such hops on contract. Don't want them even at lower prices." That refers to previous growers' hops.

Then it continues: "Same applies to Lot 64, 73 bales Kilian Smith which we reject. Willing accept his fuggles based 90 cents for 8 per cent and apply cluster advances on fuggle settlement."

This telegram is dated September 16th and was received considerably in advance of the date under discussion, prior to the submission of this telegram.

Q. Do you recall when you received notice or information from Mr. Smith that his fuggle hops were ready for delivery?

A. I don't recall having received such a notice from Mr. Smith at any time that his fuggle hops were ready for delivery.

Q. Did you instruct Mr. Byers not to inspect the fuggle hops unless Mr. Smith agreed to the deduction of the cluster advances in settlement for the fuggles? A. No, I didn't.

Q. What were your instructions to him on that subject of the deduction of the cluster advances? What were your instructions as to the deduction of

(Testimony of C. W. Paulus.)

the cluster advances from the settlement on the fuggles?

A. My instructions to him were based upon the wire that I had [166] received from Hugo V. Loewi, Inc., and which he read to me over the telephone from Salem, while I was in Yakima.

I instructed him to proceed on the basis of that telegram and make contact with Mr. Smith and endeavor to effect a settlement with him on the basis of the delivery of those 59 bales of fuggles, as set forth in the telegram.

Q. In 1947 was there any difference in the trend of the market, or the market price of fuggles and clusters? I do not mean with respect to the actual amount but with respect to the rising or lowering of the market price.

A. Fuggles and clusters did not vary greatly as between them in price, in the spring or in the fall.

However, the price incline began in August and there developed finally a differential of approximately 5 cents a pound premium for the fuggles over clusters, which continued until about December 1st.

Q. Do you know of any growers in the Willamette Valley in 1947 who did not harvest their hops during that year?

A. I can't recall any such grower to mind.

Q. Do you recall growers in the Willamette Valley who during that year failed to harvest part of their crop?

(Testimony of C. W. Paulus.)

A. Yes. I recall there were some growers that did not harvest all of their crop.

Mr. Kerr: That is all, Mr. Paulus. Thank you. [167]

Cross-Examination

By Mr. Dougherty:

Q. Mr. Paulus, with reference to this swapping of fuggles that you have testified about, do I understand at that time Hugo V. Loewi wanted more fuggles? Did I understand you correctly, Mr. Paulus?

A. Did you say swapping?

Q. Yes. A. Swapping of fuggles?

Q. Did I understand you to testify that Hugo V. Loewi, Inc., was at one time willing to take more of Mr. Smith's fuggles?

A. He proposed to take the fuggles in exchange for an offsetting amount of clusters.

Q. Who proposed it?

A. Hugo V. Loewi, Inc., as testified in the reading of this telegram.

Q. Were those other fuggles under contract to Mr. Seavey at that time?

A. Yes, they were.

Q. Did you encourage Mr. Smith to commit larceny by a mortgagor?

A. I most certainly did not.

Q. As a matter of fact, didn't you know it would have been acceptable to Mr. Seavey, the mortgagee, if that deal had been carried out?

(Testimony of C. W. Paulus.)

A. I certainly did not, since this proposal for the purchase of [168] the fuggles came from Mr. Kilian Smith to me, advising that Mr. Seavey did not want to take in the hops, that he couldn't take them in, and that both Mr. Seavey and Mr. Smith wished to sell the hops, and the proposal came to me that they wished to sell the hops and would Hugo V. Loewi, Inc., buy them.

Q. Mr. Smith and Mr. Seavey?

A. I mean—not Mr. Seavey, but Mr. Smith informed me that Mr. Seavey wanted to sell them.

Q. So Mr. Smith told you that it was acceptable to Mr. Seavey? A. That is correct.

Q. With reference to Exhibit 45, I understand that proposal was made by Hugo V. Loewi, Inc., is that correct?

A. In reading this telegram it refers to a proposal made by Hugo V. Loewi, Inc.; however, that was preceded by information which I passed on to Hugo V. Loewi, Inc., relating to the proposal that Kilian Smith promoted by his conversation with Mr. Seavey, that Kilian Smith make an effort to sell 100 bales covered by the Smith contract.

Q. From this exhibit does it appear on September 25th you were instructed by Hugo V. Loewi, Inc., to make Smith a proposition to replace Lot 64, 73 bales of clusters, which were rejected, with 75 bales from his fuggles, provided "clusters which we reject for 75 bales——" That is a repetition there. But is the foregoing portion of the statement correct?

(Testimony of C. W. Paulus.)

A. That is verbatim from the telegram. [169]

Q. Was that offer subsequently withdrawn by Hugo V. Loewi, Inc.? A. Yes.

Q. Was Mr. Smith still interested in the offer after Hugo V. Loewi, Inc., had withdrawn it?

A. No, he was not. He was interested in selling the fuggle hops, the entire 100 bales of fuggle hops which were under contract to Seavey.

Q. He was interested in selling the fuggles, and do I understand Mr. Seavey was also interested in them?

A. According to the information given me by Mr. Smith.

Q. Do I understand that Mr. Seavey to whom we have been referring is one of the independent hop dealers in this area?

A. I don't know just what you mean by "independent hop dealers."

Q. He does not operate exclusively for any buyer, is that correct?

A. He has been buying for several buyers.

Q. Is it correct that Hugo V. Loewi, Inc., refused to purchase 100 bales of fuggles or any portion of them?

A. He offered to buy them, a portion of them, and then later on decided not to.

Q. Mr. Paulus, did you have authority from Mr. Oppenheim personally to enter into this arrange-

(Testimony of C. W. Paulus.)

ment with Mr. Smith with respect to his 1947 fuggles and clusters?

A. Whether or not it was direct authority to buy Mr. Smith's I [170] can't say; I doubt it very much; but I had orders from him to buy fuggles and clusters from growers.

Q. Mr. Oppenheim was himself in the Willamette Valley at that time? A. That is true.

Q. Were you having daily discussions with him?

A. I saw him, yes, every day.

Q. At the time that you authorized Mr. Fry to sign Mr. Smith up on a sales slip, you knew, didn't you, that his yard had mildew in it?

A. I don't know that I did, no.

Q. Didn't Mr. Fry report to you that it had mildew in it?

A. He may or may not have. I was in and out of the office, away from the office. I gave instructions to my office by telephone late at night and early morning; sometimes transmitted through Mr. Byers, by Mr. Byers to Mr. Fry. Just how those negotiations were carried on at that busy season of the year I can't inform you today.

Q. Why was that season of the year so particularly busy, Mr. Paulus?

A. There was a lot of activity at that time in the buying field and in going around the territory and seeing the yards and also servicing our then existing grower customers. By "then existing"

(Testimony of C. W. Paulus.)

I mean growers with whom we had contracts at that time.

Q. Mr. Oppenheim was interested in buying a quantity of hops [171] at that time, was he not?

A. Yes. We had orders for a quantity of hops.

Q. Do you know whether or not Mr. Oppenheim was advised that this yard had mildew in it?

A. I can't say.

Q. Mr. Oppenheim was here at that time?

A. He was in Oregon and he knew there was mildew in yards in Oregon, definitely.

Q. At the time the sales slip was executed you knew, did you not, that Mr. Smith's fuggles had been picked?

A. No, I didn't know that detail at all.

Q. Well, why wouldn't you know such a detail?

A. I left that to my men in the office, to discharge that, after they received their general instructions as to how to proceed. I am not acquainted with all of those details.

Q. That was a matter for Mr. Fry to handle, is that correct?

A. What matter do you refer to? Just the matter that he had picked his fuggles at the time the contract was signed? What do you mean by that?

Q. The matter of making advances under this contract.

A. The arrangement with Mr. Smith, at the time the contract was negotiated, was that he would receive for the picking of the fuggle crops so much

(Testimony of C. W. Paulus.)

money and whether or not he had concluded the picking of the fuggle crop at the time the contract was signed certainly did not preclude then the payment to him [172] of the amount which the contract called for, for the specific picking of the crop.

Q. Mr. Paulus, you speak of the arrangement with Mr. Smith. Did you have personal knowledge of that arrangement?

A. It is all set forth in the negotiation, namely that——

Q. Did you negotiate with him?

A. The contract provided——

Mr. Kerr: Just a minute.

A. The contract provided the payment of specific amounts of advances for the harvesting of the fuggle crop. That was the arrangement.

Q. (By Mr. Dougherty): With reference to this contract, of course, you are acquainted with that form of contract, are you not? A. Yes.

Q. With reference to making advances it says “provided such sums are actually required for the cultivation, picking, drying and baling of said hops.”

What meaning does that clause in the contract have, Mr. Paulus?

A. Well, it seems self-evident what it means, that if the grower requires these funds for harvesting of his crop and to the extent needed they will be advanced.

Q. Do I understand your testimony to be, Mr.

(Testimony of C. W. Paulus.)

Paulus, that such advances are made regardless of the use to which they are put?

A. Most certainly not. [173]

Q. Do I understand, then, that such advances are made only if they are needed for picking and only if they are used for picking and these other purposes?

A. That is right, and I am certain that is what Mr. Smith told Mr. Fry, that he needed that much money to pick his fuggle hops. Otherwise it would not have been inserted in the contract. The fact when the contract was signed that the fuggle hops were picked did not make a bit of difference.

Q. Where does your certainty on this matter come from?

A. Since it is normal accepted practice and was carried on at all times.

Q. Have you any personal knowledge of this? Did you discuss this matter with Mr. Smith?

A. No.

Q. Were you present when the matter was being negotiated? Were you present when Mr. Fry was carrying on the negotiations?

A. I was not, but it is certainly the practice, and that is the reason I am answering you that way.

Q. Normal practice? A. Normal practice.

Q. Would it not be normal practice for Mr. Smith to use these advances in picking his clusters?

A. We do not supervise what a grower does with the funds after we advance money to him in good

(Testimony of C. W. Paulus.)

faith for the purpose intended. We do not hold him to an accounting for them. [174]

Q. Did Mr. Fry report to you that Mr. Smith was interested in a deal only if he could sell his fuggles and clusters together?

A. I got such a report from him. As a matter of fact, prior to the time I received a report on the telephone from another field man that Mr. Smith was interested in selling, but he didn't want to sell his fuggles alone.

Q. But you authorized Mr. Fry to make a deal with Mr. Smith on his fuggles and his clusters?

A. Yes, ultimately that is the case.

Q. Whose idea was it to split these up into two contracts, two pieces of paper?

A. I am sure I can't tell you that. I think Mr. Byers did that in the office.

Q. I believe you testified, Mr. Paulus, that on or about September 10th you forwarded one sample of Mr. Smith's clusters to Hugo V. Loewi, Inc., is that correct?

A. I read the exhibit in the record here a moment ago. I think on September 10th there were two samples sent to Hugo V. Loewi, Inc., one by express and one by airmail or air express.

Q. Then do I understand, Mr. Paulus, with reference to Exhibit 17, that immediately upon receipt of that sample Hugo V. Loewi, Inc., instructed you to notify Mr. Smith that Hugo V. Loewi, Inc., re-

(Testimony of C. W. Paulus.)

fused to accept such hops on contract? Is that correct? A. Yes. [175]

Q. Did you so notify Mr. Smith that Hugo V. Loewi, Inc., refused to accept the hops on contract?

A. Not immediately upon receiving that telegram.

Q. Did you release Mr. Smith's contract so he could make another deal on his fuggles and his clusters? A. No, sir.

Q. Is it customary in the hop trade, as you know it, Mr. Paulus, to reject a crop on the basis of a single sample prior to complete inspection?

A. I don't think it is. Complete inspection is generally undertaken prior to the time of formal rejection, although I believe you could reject on the basis of a sample.

Q. Such is the case here, is it not; rejection was made on the basis of one sample? Your instruction was to notify the grower that Hugo V. Loewi, Inc., refused to accept these 73 bales?

A. Yes, hops that run like that would not be acceptable. The inference may be that if the hops in that lot run to that sample, they would not accept them. That is the meaning of it and the intention as it came to me.

Therefore, following that an inspection was made and tenth-bale samples submitted to Hugo V. Loewi, Inc., for their final acceptance or rejection, which resulted in the rejection of the lot.

Q. Hugo V. Loewi, Inc., however, receded from

(Testimony of C. W. Paulus.)

the original position that they refused to accept the hops? [176] A. No, they did not.

Q. But the formal inspection was gone through? Is that correct? A. That is right.

Q. Was there anyone in Oregon at that time who had any authority to accept those hops?

A. No.

Q. As a matter of fact, at the time the inspection was made your orders were to reject them, is that correct?

A. If they run like the sample. However, I believe you will find correspondence in the file—at least, that was the case with other growers and I believe in the case of Kilian Smith—that tenth-bale samples were to be submitted for their final decision.

Q. But Mr. Oppenheim did not recede from his original position that he refused to accept them?

A. No.

Q. After you had been notified that Hugo V. Loewi, Inc., refused to accept the hops did Mr. Smith notify you of his selection of the growers' market price? A. Yes, he did.

Q. What was the selected market price?

A. 85 cents per pound for cluster hops containing 8 per cent leaf and stem and 90 cents per pound for fuggle hops.

Q. Was that the growers' market price at that time? A. Yes. [177]

(Testimony of C. W. Paulus.)

Q. Where did Mr. Smith take his 1947 clusters and fuggles?

A. He hauled them to the Oregon Electric warehouse in Salem.

Q. Was that place acceptable to the Loewi corporation?

A. Yes. A lot of hops are stored there.

Q. Was the time he took them there acceptable to the Loewi corporation?

A. As far as I know.

Q. You did take in his fuggles there, is that correct?

A. Yes, we received 59 bales of fuggles at the Oregon Electric.

Q. These documents that you had Mr. Smith sign, or this document, rather, permitting you to inspect his clusters, why did you prepare such a document? What was the purpose of that document?

A. The purpose was to have the growers stipulate with us, in the form of a letter, stating that our inspecting and handling and weighing and numbering on the head of these bales would not be misconstrued by him as an acceptance by us of his hops.

Q. In the absence of such a letter would those acts normally constitute an acceptance?

A. I don't know.

Q. According to the custom in the hop trade?

A. I don't know.

Q. Isn't it the normal custom in the hop trade

(Testimony of C. W. Paulus.)

that when hops are run across the weighing scales that they are the buyer's hops?

A. I heard it stated in the trial that they believe that is the [178] case, but I have never been so advised legally, nor do I know whether there are any suits that have so held.

Q. I am not asking you about that.

A. It is a matter of understanding.

Q. I am not asking you for your legal conclusion. I am asking you about the custom in the hop trade.

A. I don't even know whether it is a custom of the hop trade. It has been so understood.

Q. Did you obtain such a stipulation from Mr. Smith because you were afraid it would prejudice your position if you did not?

A. I don't know as that was the case exactly. It was to expedite the handling of the hops in the warehouse. That is really what prompted the whole deal, that even if the hops, even though rejected, had later been received on a spot purchase from Mr. Smith at a subsequent date, we could have settled with him on that purchase much easier if they had been weighed. The congestion in the warehouse at that time was terrific. There was a shortage of help. It also obviated the additional expense for rehandling, and it was those considerations that prompted us to get such a stipulation from Mr. Smith.

(Testimony of C. W. Paulus.)

Q. Had you ever used such methods in prior years to expedite the handling of hops?

A. Yes.

Q. At the time you had Mr. Smith execute this document were your orders to reject the hops? [179]

A. If—no, our orders were to send tenth-bale samples for Hugo V. Loewi, Inc.'s final consideration and decision.

Q. But at that time is it not a fact that Mr. Oppenheim advised you, in effect, that he did not intend to change his mind?

A. I can't recall any definite notification by letter or telegram to that effect, that he would not change his mind.

(Recess.)

Q. (By Mr. Dougherty): Did you have a chemical analysis made of Mr. Smith's cluster hops in 1947?

Mr. Kerr: I object on the ground that the question of a chemical analysis is immaterial.

The Court: He may answer.

A. I did not, personally. However, I submitted various samples, one of which was the Kilian Smith cluster sample, to Paul T. Rowell, Assistant Manager, United States Hop Growers Association, and he sent that to Oregon State College for analysis.

Q. Did you receive a report on those ten or eleven samples from Oregon State College?

A. Yes.

(Testimony of C. W. Paulus.)

Q. Did you have any analysis made in 1947 by Hopulon? A. No, I didn't.

Q. Did any of your growers have any?

A. Not to my knowledge.

Q. Isn't that a recognized laboratory? [180]

A. Not to my knowledge.

Q. How about Schwarz?

A. I understand Schwarz is an Eastern laboratory, in New York City.

Q. Did you have any analyses made by Schwarz?

A. No, I didn't.

Q. Did your growers have analyses made by Schwarz? A. Not to my knowledge.

Q. In prior years had you had chemical analyses made? A. No.

Q. Never had chemical analyses made before, is that correct? A. Not to my recollection.

Q. Have you ever heard of chemical analyses used in the trade? A. No.

Q. Do you know whether or not breweries ever have chemical analyses made?

A. I have heard it stated that some breweries analyze hops which come to their brewery in its laboratory.

Q. Reading from Exhibit 24 in this case, which is a letter to you from Mr. Oppenheim, it states: "You refer to the brewing analyses made by Schwarz Laboratories and the Hopulon Corporation on the Murphy samples." What has that reference to?

(Testimony of C. W. Paulus.)

A. I might refresh my memory if you would hand to me the prior correspondence on that subject.

Q. Unfortunately, we were not permitted to see that, Mr. Paulus. [181]

A. Then I will answer by saying it is possible Mr. Oppenheim may have had some analyses of hops by those respective laboratories.

Q. By whom were those twelve analyses made at Oregon State College?

A. I don't know, Mr. Dougherty. However, the letter or report which I received came from Mr. Bullis, I believe.

Q. Do you know Mr. Bullis at the College?

A. Yes.

Q. Mr. Paulus, have you ever known of another occasion where a hop buyer has contracted to buy hops with a known defect such as mildew and has subsequently rejected the hops because of that same defect which he knew existed at the time he contracted to buy them?

Mr. Kerr: Just a moment. I missed the beginning of that question. Mr. Reporter, would you read the question to me?

(Last question read.)

A. There were other contracts made, Mr. Dougherty, on or about the time that the Kilian Smith cluster contract was made. However, what ultimately occurred in the settlement of those contracts I couldn't advise you right at this time. I

(Testimony of C. W. Paulus.)

will say, however, that this downy mildew attack which we had in 1947 at the blossom-bearing stage was something very unusual, and probably the first time that it has ever occurred, so that it was an unusual situation. [182]

Q. Can you say of your own knowledge whether or not Mr. Oppenheim and the Loewi corporation were fully advised as to that unusual condition?

A. Yes.

Q. At a time prior to the execution of these contracts?

A. I couldn't say whether it was at a time prior, but probably at about the time.

Q. Do I understand that Mr. Oppenheim was in Oregon about the 12th of August?

A. I believe he had just arrived.

Q. And that these contracts were executed—was it the 19th or 20th of August?

A. Thereabouts, the 17th or 18th or 19th.

Q. Were you at that time contracting all of the hops that you could, even though there was a considerable amount of mildew in the Valley?

A. No. We had only limited orders.

Q. What was the limit of your orders?

A. I couldn't recall now what it was.

Q. Isn't it a fact, Mr. Paulus, that on Mr. Oppenheim's instructions you were trying to buy up all the hops you could get?

A. No, that is not the case.

Q. Were you not out in the field trying to buy

(Testimony of C. W. Paulus.)

hops at that time? [183] A. Personally, no.

Q. I believe that you have previously testified that you were out trying to buy hops and servicing contracts which you already had. Is that true or not?

A. I might qualify my previous answer. I made some purchases in the field, and through that particular week that you were just referring to, from the date of Mr. Oppenheim's arrival until the Smith contract was negotiated or signed, I was in the field inspecting yards most of the time.

Q. And during that time did Mr. Fry have standing orders to buy hops?

A. Limited orders.

Q. What was the limit on those orders?

A. Up to a certain amount, and I can't recall now what that was. Whether it was four or five hundred bales I can't recall.

Q. Or 1500 or 2000 bales? A. No, sir.

Q. Or a thousand bales? A. No, sir.

Q. Do you know, as a matter of fact, how many hops you did contract for during that period?

A. Which period, Mr. Dougherty?

Q. The period starting with Mr. Oppenheim's visit up until the 15th of September, when Mr. Oppenheim went out of the market and did not wish to buy any more hops, a period of approximately [184] a month.

A. I couldn't tell you how many hops we bought

(Testimony of C. W. Paulus.)

during that period now without referring to the records.

Q. Are those the records which we were not permitted to inspect, Mr. Paulus?

A. This is the first time I have heard you refer to them or ask any questions concerning other records.

Q. Is it not a fact that on advise of counsel you refused to permit us to inspect your records with respect to other growers?

A. I understood that as being samples.

Q. Was not the matter of records also covered?

A. No, not to my knowledge, Mr. Dougherty.

The Court: Go to something else while Mr. Kester is looking it up. Come on. Let's speed this up. We are dragging this morning.

Mr. Dougherty: Mr. Kerr, will you stipulate that you refused to permit us to inspect the records concerning other growers?

Mr. Kerr: Frankly, I don't recall what the discussion was, whether it was with respect to the records or samples. I recall the discussion of samples of hops handled for other growers, but as to records I don't recall what our discussion was.

Mr. Dougherty: With reference to Page 98 of the deposition, Mr. Kerr, I believe you there stated: "I would advise the witness that it is not necessary for him to answer questions at [185] this time relative to the transactions between Hugo V. Loewi, Inc., and the growers other than Kilian Smith

(Testimony of C. W. Paulus.)

with respect to the 1947 crop or other crop hops.”

Mr. Kerr: And the previous reference or the precise question which aroused that advice was this: “And did you make compromise settlements in any of those cases after rejection”? Whereupon we objected to going into the issue of compromise settlements with other growers, whatever they might amount to. We have no objection, your Honor, to bringing in all the records in Mr. Paulus’ office or Hugo V. Loewi’s office in New York, if the Court would find them helpful in determining these issues, but it has been our opinion that transactions between Hugo V. Loewi—

The Court: You don’t need to address me, Colonel. There is nothing before me on the subject.

Mr. Kerr: Yes, sir.

Mr. Dougherty: With reference also to Page 100 of the deposition, Mr. Kerr, that specifically refers to the correspondence and records.

Q. Mr. Paulus, with reference to Exhibit 16, which you have in your hand, is that a letter from Hugo V. Loewi, Inc., directing you to reject the Smith clusters?

A. Upon quick reading I don’t see any definite instructions to reject.

Q. What does it say with reference to the Smith clusters? [186]

A. The particular reference is: “We take the same stand on Lot 64, 73 bales Kilian Smith. We will not accept such hops.” And that is prompted

(Testimony of C. W. Paulus.)

by comparison with another sample which is described as dirty picked and blighted "and the quality of hops which we cannot deliver to our customers."

Q. Do I understand, then, that the two specific grounds on which Loewi said that they would not accept the hops were the grounds that they were dirty picked and badly blighted? Is that correct?

A. That is here so stated, yes.

Q. Did these hops run a 9-per cent pick?

A. That is my recollection, yes.

Q. Was that within the 10-per cent pick allowed by the contract? A. Yes.

Q. Would you say, then, that under this specific contract these hops were dirty picked?

A. I would still say the hops were dirty picked but that that tolerance was permitted under the contract.

Q. Were these hops any more blighted than they had been when they were examined by your employee in the field?

A. I believe the testimony of Mr. Fry, my employee, was that there were good hops on the vines not injured by downy mildew and hops which were injured, and the samples so show. There are healthy burrs with good color in the sample, and then the downy mildew. [187]

Q. Does this contract refer to the entire crop of hops? A. Yes.

(Testimony of C. W. Paulus.)

Q. With reference to Exhibit 22, Mr. Paulus, was it your opinion that the original sample which you sent to Mr. Oppenheim and on which he based his rejection was not truly representative of the crop?

A. I stated that "The early sample"—meaning one sample—"which was delivered to you"—meaning Hugo V. Loewi—"of this lot is in my opinion hardly representative of the entire lot." And I carried on: "An additional line of five samples of Lot 64 was airmailed to you today for your further examination and consideration."

Q. Was it then your opinion that that first sample was not representative of the entire lot? Is that correct?

A. My opinion is expressed as read from this letter.

Mr. Dougherty: Thank you, Mr. Paulus.

Redirect Examination

By Mr. Kerr:

Q. Mr. Paulus, you have referred to orders which you had from Mr. Oppenheim to buy the hops for his firm. Were those orders for hops in the bale? A. Yes.

Q. Were they orders to buy hops on the vines?

A. No. [188]

Q. Were they orders to buy mildew-damaged hops? A. No, for prime hops.

Q. Were they orders to buy diseased hops?

A. No.

(Testimony of C. W. Paulus.)

Q. What quality hops were you directed by Mr. Oppenheim to buy for his firm?

A. Prime hops under his form of contract.

Q. In making advances to growers under the contract did you rely upon the representation of the individual grower as to what he reasonably requires for the purpose specified in the contract?

A. Yes, we do.

Q. What is your practice, the practice of your firm, in negotiating or preparing contracts to be executed by Hugo V. Loewi, Inc., relative to covering the fuggles and clusters in separate contracts?

A. Generally when a contract is made covering the production from the yard or yards of one grower, they have been in the past included in one contract. In 1947 and in the instant case of Mr. Smith and Geschwill, for some reason Mr. Byers, who is in my office, made two separate contracts, and I couldn't give you the reason why.

Q. When you advised Hugo V. Loewi, Inc., that in your opinion the first sample was hardly representative of the entire lot, being your letter to Hugo V. Loewi, Inc., which is Plaintiff's Exhibit 22, were you then hopeful that later samples would show [189] a better quality?

A. Yes, the first sample was taken early, and I believe was only one sample taken from one bale, or it may have been two samples out of one bale, and I hoped that subsequent more representative samples, or a larger line of samples, might show a different quality.

(Testimony of C. W. Paulus.)

Q. On that date the tenth-bale samples had not yet been drawn, had they, on September 20th?

A. I don't believe they had been drawn on September 20th, no.

Q. Have you ever purchased any hops from growers on the basis of chemical analyses of those growers' hops? A. No, I have not.

Q. Were you at any time authorized by Mr. Oppenheim or Hugo V. Loewi, Inc., to buy for that firm any hops which had any defects under term contracts? A. No.

Mr. Kerr: That is all. Thank you.

Recross-Examination

By Mr. Dougherty:

Q. Mr. Paulus, did you decide to draw up two separate contracts on Mr. Smith because the fuggles had already been picked?

A. I don't think that entered into it. I didn't know that the fuggles were picked at the time of signing the contract.

Q. Most of the fuggles in the Valley at that time had been [190] picked, hadn't they?

A. Not all of them.

Q. There were a few that had not been?

A. It is very possible.

Q. There were two separate contracts made because either you or Mr. Oppenheim had then decided that you would take the fuggles but intended to reject the clusters.

(Testimony of C. W. Paulus.)

A. Most certainly not. I testified before that that decision was made by Mr. Byers, and I didn't even know anything about it. I didn't see the contracts until after they were signed, as a matter of fact, by Mr. Smith.

Q. Were there any standing orders on that matter?
A. On what matter?

Q. On this deviation from the ordinary custom of making one contract to cover both fuggles and clusters?

A. No, since it had been our office practice always to cover varieties of hops grown by a grower in his respective yards under one contract.

Q. Was the matter then solely within the discretion of Mr. Byers?

A. Yes. And upon reflection upon the subject right now I think what prompted him to do so, and what would have prompted me to do so was the fact that these riders regarding price and selection of fuggles and clusters was incorporated into one big rider, and I think he did it on that basis. That is my belief.

Q. Were those riders used on prior year contracts? [191]

A. I don't believe this particular form, since this had changed again from the manner of selection, and so on, and changed from previous years, I believe.

Q. You say that no one in your organization had any authority to buy hops with any defects. Did

(Testimony of C. W. Paulus.)

anyone in your organization have any authority to accept any hops at all?

A. The particular answer that I made to that question was regarding the purchase of hops for Hugo V. Loewi. We were authorized to purchase only prime hops under contract for Hugo V. Loewi, and upon advice from the office of Hugo V. Loewi during the fall of 1947 we were instructed that with reference to contract deliveries we were not to accept hops until the samples had been accepted by them. I believe that should answer your question.

Q. Were you ever permitted to exercise your own judgment, Mr. Paulus, as to whether or not you could accept any hops under contract for Loewi in 1947, or did all of your instructions come specifically from Loewi?

A. That year we were instructed to submit samples of all lots to New York for their approval prior to our acceptance of the lots.

Q. Was that a deviation from your ordinary practice? A. Oh, slightly, yes.

Q. In prior years have you been authorized to accept hops under contract upon the exercise of your own judgment? [192]

A. Following submission of the type samples to Hugo V. Loewi and their acceptance of those type samples. Then we were asked to take delivery of hops and accept them providing they ran true to those type samples accepted by Hugo V. Loewi. In the instant case of 1947, however, Hugo V. Loewi

(Testimony of C. W. Paulus.)

desired that tenth-bale samples of lots be submitted to them following inspection for their final examination and acceptance or rejection.

Q. Did you advise Mr. Geschwill or Mr. Smith before these contracts were entered into that that practice had been changed?

A. I did not, since I did not receive such instructions until sometime early in September.

Q. Loewi changed the practice after these contracts were made; is that correct?

A. I wouldn't say it is a change of practice.

Mr. Dougherty: Thank you, Mr. Paulus.

Mr. Kerr: That is all.

(Witness excused.) [193]

G. R. HOERNER

was thereupon produced as a witness in behalf of the Defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kerr:

Q. Will you state your name.

A. G. R. Hoerner.

Q. You identified yourself and qualified, I believe, in connection with the previous case?

A. I believe that is true.

Q. Did Mr. Fry of C. W. Paulus' office deliver to you a sample of hops recently?

A. Yes. The sample I hold here, No. 64, was

(Testimony of G. R. Hoerner.)

delivered by him to me in my office in Corvallis on Thursday of last week.

Q. Had you been requested to make a separation of that sample with respect to mildew-damaged material and sound material? A. Yes, I was.

Q. By whom was that request made?

A. I presume by Mr. Paulus, through Mr. Fry.

Q. Were you directed by the head of your department at the College to make that separation?

A. No, I wasn't.

Q. Did Mr. Fry tell you what hops they were?

A. No. I simply had the sample by number.

Q. Does the sample as delivered to you by Mr. Fry bear a number? [194]

A. Yes, it bears Lot No. 64.

Q. Did you make such a separation?

A. Yes, I did.

Q. Will you explain to the Court the method that you followed in making that separation?

A. The original sample was opened. Approximately one-third of that sample was removed and weighed, and then three divisions were made with a Bates divider, which is the official equipment used by the Federal and State Inspection Service. The purpose for using that was to get a representative sample, so that the end sample which I examined carefully for leaves and stems, clean cones and infected cones, or parts thereof, consisted of approximately one-eighth—or approximately one-third of

(Testimony of G. R. Hoerner.)

the sample that originally was placed in this Bates divider.

Q. Excuse me. Is that Bates divider the same divider that is used by the Federal office in making the official determinations of leaf, seed and stem content? A. It is the same equipment.

Q. Very well. Will you proceed, please.

A. Following the choice of this eventual sample which was weighed, we actually separated the leaves and stems, the healthy cones and the diseased cones.

Q. How did you make that separation?

A. By hand.

Q. How did you determine which of the material in the sample [195] was healthy; that is, not affected by downy mildew, and which had been affected by downy mildew? A. Optical examination.

Q. Could you readily determine that by visual examination? A. Yes, I could.

Q. And what were the results of your separation in that manner?

A. If I may refer to my notes——

Q. You may.

A. I have a record of that here. The original weight of the sample was 15.2 grams; leaves and stems, 1.8 grams; clean cones or portions thereof, 2.2 grams; infected cones or portions thereof, 11.2 grams; per cent of infected cones, 83.58 grams.

Q. Now, by "infected cones" you mean infected by what? A. By downy mildew.

Q. Had you previously made an estimate purely

(Testimony of G. R. Hoerner.)

on the basis of viewing the top of the sample of the probably per cent of infected material?

A. Yes. My estimate from an optical examination of the surface of the broken sample was 80 per cent discoloration due to downy mildew.

Q. In your judgment was that method of determining the relative proportion of that sample which was affected by downy mildew a reasonably accurate method? A. I think so.

Q. Doctor, do you appear here as well as in the previous case [196] under subpoena?

A. That is true.

Q. Would you have performed a similar separation or inspection or determination for anyone who had requested it of you?

A. Very readily. I am a public servant. My services are open to anyone.

Q. Then you appear here under subpoena as a matter of public service? A. That is true.

Q. And you would for whoever might request it; is that right? A. That is true.

Mr. Kerr: That is all.

Cross-Examination

By Mr. Dougherty:

Q. Where was that subpoena served on you, Mr. Hoerner? A. Here in Portland.

Q. Did you voluntarily come to Portland on the understanding that you would be given a subpoena when you arrived? A. That is true.

Q. Did you take this matter up with the head of your department? A. No.

(Testimony of G. R. Hoerner.)

Q. As I understand it, these hops ran a little bit better than the College yard in 1947; the College yard had about 97 per cent?

A. My reference to the College yard was to standing vines, not [197] to pressed samples.

Q. But the standing vines at the College yard showed about 97 per cent?

A. I think that was the figure I testified to, yes.

Q. Do I understand that in your separation here, Doctor, the so-called infected cone is a cone which shows any slightest trace of mildew?

A. That is the interpretation I used in examining these samples.

Q. Did you make any separation here separating out the nubbins?

A. No. They were considered infected, also.

Q. I see. So that pursuant to Mr. Byers' instructions you were not requested to separate——

A. No, I wasn't requested to make any separation of degree of infection.

Mr. Dougherty: Thank you, Doctor.

Redirect Examination

By Mr. Kerr:

Q. Mr. Hoerner, will you please identify the several parcels that you have in your hand by their exhibit numbers.

A. I think there is no exhibit number here, Mr. Kerr.

Q. Hasn't that been marked?

A. I think it has not been marked.

(Testimony of G. R. Hoerner.)

Mr. Kerr: Will you place a mark in pencil on each package as you identify it, and it will then be marked by the Reporter. [198] I thought that it had already been marked with an exhibit number. Will you mark 57-A on one of those packages and explain what that is.

A. 57-A is the remains of the original sample as submitted to me. 57-B is the remains of the unused portion of that sample which went through the Bates divider. 57-C represents the clean cones and 57-D the infected cones—leaf and stem, 57-D, and 57-E the infected cones.

Q. Do the damaged or infected cones include what is known as nubbins or small——

A. Yes, all types of infection.

Q. Do the contents of that package include any substantial portion of such immature cones?

A. I could not state definitely. There are some there, certainly.

Q. Is Mr. Don Hill the head of your department?

A. No, he is not. He is head of the Farm Crops Department.

Q. You don't know whom Mr. Paulus contacted at the College in order to arrange for you——

A. Yes, Mr. Paulus contacted Dr. Hill, who in turn requested that I perform this service, which I agreed to do upon presentation of a subpoena.

Mr. Kerr: Thank you.

(Hop Samples above referred to were thereupon marked by the Reporter Defendant's Exhibits Nos. 57-A to 57-E, inclusive.) [199]

(Testimony of G. R. Hoerner.)

Recross-Examination

By Mr. Dougherty:

Q. Just one thing, Doctor: As I understand it, this is the second time in your years of experience that you have made such a separation; is that correct?

A. All three samples and separations at these two hearings were made at the same time.

Mr. Dougherty: I see.

(Witness excused.) [200]

HAROLD W. RAY

was thereupon produced as a witness in behalf of the Defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kerr:

Q. Are you the Mr. Harold Ray who testified in the previous case? A. Yes.

Q. Have you examined the samples of the Kilian Smith late cluster hops, 1947, Lot 64, which are in evidence here as Exhibit No. 52-A to 52-E, those being the exhibits or the samples——

A. Yes, I have examined the samples, those exhibit identifications which were purported to be the samples of the Kilian Smith 1947 hops.

Q. Are those the samples that are marked Defendant's Exhibit 52?

(Testimony of Harold W. Ray.)

A. 52-A to 52-E, inclusive, and also marked Lot 64.

Q. When did you make that examination?

A. I examined the five samples, those exhibit numbers, last evening at the adjournment of court.

Q. State with respect to each of the samples your opinion as to whether or not those hops were of prime quality when removed from the bale?

Mr. Kester: Just a moment. What samples?

Mr. Kerr: Will you state what samples you are now talking about?

A. I am talking about the five samples marked Exhibits 52-A to 52-E, inclusive, Lot or Sample No. 64, and the samples were marked Bales No. 10, 20, 40, 60 and 70.

Mr. Kester: My question, your Honor, is addressed to try to find out what samples these are. I mean, we have never seen them. We don't know where they came from. We would just like to know what samples they are talking about, where did they come from, and how did they get in the courtroom?

Mr. Kerr: They have been identified, I believe, by Mr. Paulus.

Mr. Kester: I don't recall that there was any reference made to them. I just want to know for information.

Mr. Kerr: I believe they are identified by the Reporter. I will have to put Mr. Paulus back on the stand for that purpose.

(Testimony of Harold W. Ray.)

Mr. Kester: Just tell us where they came from and what are they?

Mr. Kerr: These are tenth-bale samples which are taken from the Kilian Smith late cluster hops as testified to by Mr. Fry, sent from Mr. Paulus' office to New York, the New York office of Hugo V. Loewi, Inc., and then returned by Mr. Oppenheim from that office to this courtroom. Is that satisfactory?

Mr. Kester: Are they the complete samples, splits, or do they contain all the hops that were originally in them when they were sent to Mr. Loewi? If they have been clear back to [202] New York and out here again we would just like to have some assurance that they are proper samples. That is all.

Mr. Kerr: I think I had better put Mr. Paulus on the stand.

The Court: All right. Step down, Mr. Ray.

(Witness withdrawn.)

C. W. PAULUS

was thereupon recalled as a witness in behalf of the Defendant and was further examined and testified as follows:

Direct Examination

By Mr. Kerr:

Q. Are you informed as to the nature of Exhibits 52-A to 52-E, being certain hop samples?

A. Yes.

(Testimony of C. W. Paulus.)

Q. Will you describe them.

A. The five samples submitted as Exhibits 52-A to 52-E are the original tenth-bale inspection samples taken from Lot 64 of the Kilian Smith 1947 crop clusters. Originally there were seven samples. Five are here as exhibits, all of them having been returned to my office by the office of Hugo V. Loewi. One of the samples returned—one of these tenth-bale samples which was returned by Hugo V. Loewi was submitted by me through Lamont Fry to Mr. Hoerner, and is in evidence here with Mr. Hoerner's exhibit number.

Q. That is 57-A, I believe. Can you identify 53-A to 53-G, being seven samples?

A. Those are the splits of the seven tenth-bale samples taken from the Kilian Smith crop upon the inspection which were retained in my office.

Q. Can you identify Exhibit 54-A to 54-G, seven samples?

A. Those are the original type samples taken from the Kilian Smith lot earlier in the season, prior to inspection of the lot as testified to.

Q. Can you identify 55-A to -F, six samples?

A. Those are the inspection samples of the Kilian Smith fuggle Lot No. 14, 59 bales.

Q. And Exhibit 56, one sample.

A. That is one type sample of the Kilian Smith fuggle lot, at that time estimated at 150 bales, which is the first sample removed from that lot and is our type sample.

(Testimony of C. W. Paulus.)

Q. Do you know where the one missing tenth-bale sample of Lot 64, the clusters, may be?

A. No, I do not.

Q. You don't have it? A. No.

Mr. Kerr: I guess that is all. [204]

Cross-Examination

By Mr. Dougherty:

Q. Mr. Paulus, with respect to this Lot 52, or Exhibit 52-A to 52-E, have you any way of knowing if the hops returned in those wrappers are the same ones you sent to New York?

A. Do I have any way of knowing?

Q. Yes.

A. Well, I have no reason to think that they are not the original ones that were sent to Mr. Oppenheim.

Q. Do I understand you selected one of these samples to send down to Mr. Hoerner?

A. I took one of the samples—I didn't select it. I just took it.

Q. Was it a representative sample?

A. I believe that it is, yes.

Q. You examined them all and decided that that was representative; is that correct?

A. No, I think I just took one. I didn't even compare them.

Q. I see. So then you really can't say whether it was representative?

A. Well, it is one of the samples, one of the seven or five or six samples that I had.

(Testimony of C. W. Paulus.)

Q. And that was one of the six returned from Loewi; is that correct? A. Yes. [205]

Q. Did they, the Loewi corporation, return the original type sample on the basis of which they rejected the corp? A. Yes.

Q. Is that among these? A. No.

Mr. Dougherty: Thank you.

(Witness excused.)

HAROLD W. RAY

a witness produced in behalf of the Defendant, thereupon resumed the stand and was further examined and testified as follows:

Direct Examination

(Continued)

By Mr. Kerr:

Q. Will you now state, Mr. Ray, whether or not in your opinion each of the samples constituting Exhibit 52, or whether or not the hops in each of those samples was or was not at the time it was taken from the bale a prime quality hop?

A. It is my definite opinion that they were not prime quality.

Q. Why?

A. Principally because of the mildew damage.

Q. Will you describe the mildew damage in those samples.

A. Yes, I will. The mildew damage in these samples is materially different than the damage to the samples in the previous case. The hops in these

(Testimony of Harold W. Ray.)

particular samples were infected at a later [206] date of maturity than the others. These hops contained a very moderate quantity of nubbins, but there is a very general marking or discoloration of the cones. In other words, a material percentage of the cones is marked with downy mildew in each and every one of those five samples.

Q. Was that mildew damage readily apparent upon examining the sample?

A. Yes, indeed. Anyone could see it.

Q. Could there be any possible question in your mind as to the presence of that mildew damage?

A. No, absolutely none.

Q. Would you say that was a slight or a heavy mildew damage?

A. I considered it a heavy mildew damage, very much like my own hops were mildew-damaged. I would say almost identical.

Q. That is, by your own hops you refer to what?

A. I refer to 270-odd bales of my own production of 1947, which were rejected, or I rejected them myself, because of mildew damage which was practically the same as the damage to these hops. In other words, I mean that the infection occurred at about the same period of growth or maturity of the hop.

Q. Are those the hops that you referred to in previous testimony which you still have on hand?

A. Yes, I have.

Q. Those are 1947 hops of your production?

(Testimony of Harold W. Ray.)

A. Correct. [207]

Q. Is there any possible question in your mind as to whether or not any one of the samples that you have referred to would be rated as prime quality by any competent hop expert or examiner or grader?

A. I think there is no possibility of that, Mr. Kerr. The samples were quite uniform in appearance, and I don't think there would be any possibility of any hop expert grading them or any one of them as prime quality.

Q. Are the hops in those samples of good color?

A. Well, no. They are badly marked with mildew discoloration.

Q. Did you also examine——

A. The hops originally were of a yellowish color prior to their infection.

Q. Did you also examine the samples drawn by Mr. Smith from his late cluster hops, which are in evidence as Exhibit 35-A to 35-G?

A. I think I did, Mr. Kerr. I didn't note the exhibit number on those samples. I notice that they were marked Lot G-1260A, and the samples were numbered with bale numbers, 10, 20, 30, 40, 50, 60 and 70.

Mr. Kerr: Will Counsel stipulate that those are the samples which are in evidence as Exhibit 35?

Mr. Dougherty: Are these the ones over here, Mr. Ray?

A. Yes, those are the samples.

Mr. Dougherty: So stipulated, yes.

(Testimony of Harold W. Ray.)

The Witness: They were right here in front of the desk. [208]

Q. (By Mr. Kerr): You did examine those samples, then? A. Yes, I did.

Q. Will you state your opinion as to those samples.

A. Yes; my opinion on those samples is the same. Those appeared to be freshly-drawn samples; that is, recently drawn from the bale, and consequently they did have a somewhat fresher appearance. But the mildew damage or the marking of the burrs was approximately the same as it was in those other samples that I examined. I wouldn't say that they were any better in quality than the other samples that I examined. In fact, I found one that appeared to be worse than any of those others that I had examined. That was Bale No. 70.

Q. State whether or not, in your judgment, any of the samples in Exhibit 35 which you examined grades as prime quality.

A. In my opinion it could not.

Q. In your opinion could they ever have been graded as prime quality, those particular samples?

A. After the hops were baled? No, certainly not.

Mr. Kerr: That is all.

Cross-Examination

By Mr. Dougherty:

Q. Did this mildew damage, Mr. Ray, penetrate the core of the hop?

A. In some cases it did, Mr. Dougherty, and in

(Testimony of Harold W. Ray.)

others it didn't. [209] In some hops the penetration was deep and in other cones the penetration was confined largely to the surface.

Q. Was it primarily a matter of discoloration of the petals?

A. Well, I wouldn't say primarily. Just as I said, some of the cones are marked very shallowly on the surface, and other cones are marked deeper.

Q. When did you make this examination, Mr. Ray?

A. I examined the samples on that table last evening.

Mr. Kerr: You are now referring to the samples which are Exhibits 52-A to 52-E?

A. 52-A to -E, yes, Lot 64, the samples marked Bales No. 10, 20, 40, 60 and 70, which I examined immediately after the adjournment of Court last evening. These samples—I don't remember the exhibit, but they are marked Lot G-1260A, Bale Nos. 10, 20, 30, 40, 50, 60 and 70, I examined this morning prior to the opening of Court.

Q. (By Mr. Dougherty): The first group, Exhibit 52, I understand you examined that under artificial light; is that correct? A. I did, yes.

Q. What is your opinion of the color of those hops, Mr. Ray?

A. I examined the hops with respect to mildew marking, mildew damage only. The hops, judging by the samples I saw last evening—I couldn't state the original color very definitely, but I assumed that

(Testimony of Harold W. Ray.)

they were a yellowish-colored hop, and the examination of these other samples this morning confirmed that. However, [210] I could see the mildew markings in the artificial light just as plainly and distinctly as I could in the daytime.

Q. The purpose of your examination then was to determine whether or not there were mildew markings; is that correct?

A. Yes. I was grading the hops upon the basis of mildew markings, and it was my opinion that the hops were marked to an extent that would disqualify them as being a prime quality hop.

Q. Did you grade the hops on the basis of flavor?

A. No, no. I couldn't grade the hop on the basis of flavor. It is an old hop.

Q. On the basis of appearance of the lupulin?

A. That also would be discolored now, after over a year.

Q. On the basis of texture? Texture of the leaf?

A. That would be affected too. They dry out, you know.

Q. Would you characterize the hops as being large, flaky hops?

A. I would not, no. I would characterize them as just a mid-sized burr with some moderate degree of immature burrs that were damaged from mildew.

Q. The purpose of your examination was to determine whether or not there was mildew; is that correct?

A. The purpose of my examination was to de-

(Testimony of Harold W. Ray.)

termine in my own mind whether or not the hops were of prime quality or whether they could have been ever.

Q. You made that examination under artificial light; is that [211] correct, Mr. Ray?

A. I made one under artificial light and one in the daylight here, at this window.

Q. Different samples, however?

A. Yes, they were different samples.

Q. Is it the common practice in the hop trade to make examinations under artificial light?

A. It is, sir. That is, it is common under a certain type of artificial light.

Q. Is that the type of artificial light that you were using at this time?

A. I think not, no.

Q. Do I understand that on the basis of the inspection you made the only thing which prevented these hops from being prime was the mildew?

A. I presume that would be true, yes. The picking was not clean, but in listening to the testimony here, apparently the contract permitted that tolerance. And, therefore, these being old samples, I based my opinion upon mildew damage only, which in my opinion was sufficient to disqualify the hops as prime quality.

Mr. Dougherty: Thank you, Mr. Ray. [212]

Redirect Examination

By Mr. Kerr:

Q. Mr. Ray, did you re-examine these samples which are Exhibit 52 in daylight this morning?

(Testimony of Harold W. Ray.)

A. No, Mr. Kerr, I did not examine the samples that are Exhibit 52, but I did examine the samples this morning that were marked Exhibit 53-A to -G, inclusive, Lot 64. I don't know just what those samples are. They were bales marked—I think bales numbered 10, 20, 30, 40, 50, 60 and 70.

Q. What were your findings with respect to those samples marked Exhibit 53?

A. I found those samples practically identical in appearance to Exhibit 52.

Q. Are any of those samples of prime quality?

A. They were not, no.

Mr. Kerr: That is all. Thank you.

Mr. Dougherty: Thank you, Mr. Ray.

(Witness excused.) [213]

HOWARD EISMANN

was thereupon produced as a witness in behalf of the Defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kerr:

Q. Will you state your name, please?

A. Howard Eismann.

Q. Where do you live? A. At Salem.

Q. What is your occupation?

A. I am in the hop business.

Q. Are you a hop grower? A. Yes.

Q. What hop farm or ranch do you operate?

(Testimony of Howard Eismann.)

A. Well, I operate the Golden Gate Hop Ranch at Independence and the Fort Vannoy Hopyard at Grants Pass, and I and my associates operate the Hermiston Farms, Inc., at Hermiston, Oregon.

Q. How long have you been in the hop business?

A. Oh, I started working in the hopyards as a boy about 1927.

Q. How long have you been engaged in the operation of hopyards?

A. My first experience as an operator was in 1937.

Q. Are you also engaged in buying hops from growers? A. I am.

Q. In what connection? [214]

A. I have charge of the Oregon district for S. S. Steiner, Inc.

Q. How long have you been in that position?

A. Since February, 1940.

Q. In that connection has it been your duty to inspect, examine and grade hop samples?

A. Yes, it has.

Q. And have you inspected and sampled and graded hops in Oregon for S. S. Steiner, Inc.?

A. Yes, I have.

Q. Have you examined the hop samples which are in evidence as Exhibit 52-A to -E in this case?

A. Yes.

Q. When did you make your examination of those samples?

A. I examined those samples this morning.

(Testimony of Howard Eismann.)

Q. In daylight?

A. Well, on this table over here.

Q. Based upon that examination what is your opinion as to whether any of the samples is prime quality?

A. It is my judgment that they are not of prime quality.

Q. Why?

A. Primarily because of downy mildew infection.

Q. How does that downy mildew infestation or infection appear in the samples?

A. Well, there is several forms of it there. There is so-called [215] nubbins; there are some small cones where the downy-mildew infection has retarded their full development, and there are fully developed cones with blighted petals on them.

Q. How would you describe the extent of the mildew damage in those samples?

A. I would say they were damaged severely.

Q. Are those samples of hops of good color?

A. No, for the reason of the mildew.

Q. In your opinion, have those hops from the time they were first put in the bale ever been of prime quality?

A. No, because the downy mildew was on them before they were baled, and that condition does not change.

Q. Did you also examine the samples of hops which are in evidence as Exhibit 35-A to -G?

(Testimony of Howard Eismann.)

A. Yes, I did.

Q. When did you make that examination?

A. Yesterday afternoon during one of the recesses of this Court.

Q. And what is your opinion as to whether or not any of those samples is a sample of prime quality hops?

A. It is my opinion that they are not prime quality.

Q. Why?

A. For the same reasons exactly as I gave on the other samples.

Q. Did you note any material difference between the samples which are in evidence as Exhibit 52 and the samples which are in evidence as Exhibit 35 with respect to mildew damage? [216]

A. No, they run quite uniformly.

Q. Do you think that there is any room for doubt in the mind of any man who is a competent hop inspector or grader as to whether or not any of those samples would be the same as prime quality hops?

A. I don't see how there could be any doubt.

Q. Or as to whether or not any of those samples is a sample of hops of good color?

A. No, there could be no doubt about that.

Q. Would you say that the hops in those samples are fully matured hops?

A. Well, there are some fully matured hops. A good portion of them are fully matured.

(Testimony of Howard Eismann.)

Q. Are there some hops in the samples which are not fully matured? A. Yes.

Q. Could you tell the reason for the lack of full maturity of those hops?

A. On account of downy mildew stunting the full growth of the burr.

Q. Is the downy mildew damage on those samples readily apparent upon examination of the samples visually? A. Yes.

Mr. Kerr: That is all. Thank you. [217]

Cross-Examination

By Mr. Dougherty:

Q. The Golden Gate farm that you mentioned, Mr. Eismann, who owns that?

A. It is a corporation, the Golden Gate Hop Ranch of Oregon, Inc.

Q. S. S. Steiner, is that one of the large hop dealers?

A. I presume they are quite large.

Q. Does the Steiner corporation have quite a few transactions with the Loewi corporation?

A. Yes, we have transactions with almost everybody in the business at some time or other.

Q. Almost all the other dealers in the business; is that correct?

A. Yes, and almost all of the other growers, or any growers, at some time or other during the period of years.

Q. These hops that you say you examined over on that table, did you take them over to the light?

(Testimony of Howard Eismann.)

A. No, because there was too much glare here this morning.

Q. Did you examine them for flavor?

A. For me, at any rate, it is impossible to judge what they might have been as fresh hops at the present time.

Q. You can't say now what they might have been when they were——

A. Not as regards flavor.

Q. Was the purpose of your examination to determine whether or [218] not there was any mildew?

A. No. They told me to look at the samples and determine whether or not they were of prime quality.

Q. Is it correct to say that in your opinion the only reason that they are not prime is that they have mildew?

A. No, I would say that they were too dirty picked also to be of prime quality.

Q. Are those the only two reasons?

A. The only two that can be determined at this time.

Q. Did you ever see Mr. Smith's 1947 clusters in the field? A. No, I didn't.

Q. Did you ever see them in the bale?

A. No.

Q. So you have no personal knowledge of what the crop was like; is that correct? A. No.

Mr. Dougherty: Thank you, Mr. Eismann.

(Testimony of Howard Eismann.)

Redirect Examination

By Mr. Kerr:

Q. Mr. Eismann, S. S. Steiner, Inc., is a competitor of Hugo V. Loewi, Inc., is it not?

A. That is correct.

Mr. Kerr: That is all. Thank you.

(Witness excused.) [219]

(Thereupon a recess was taken until 1:30 o'clock p.m. of the same day.)

Afternoon Session

Court reconvened at 1:30 o'clock p.m., January 28, 1949.

ROBERT OPPENHEIM

was thereupon produced as a witness in behalf of the Defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kerr:

Q. Mr. Oppenheim, you testified in the previous case, the Geschwill case, did you not?

A. Yes, sir.

Q. You are the President of Hugo V. Loewi & Company, the defendant in this case?

A. Correct.

Q. Did you personally inspect the samples sent to the New York office of your concern by Mr. Paulus of the Kilian Smith 1947 late cluster hops?

A. Yes.

(Testimony of Robert Oppenheim.)

Q. Do you recall what samples your New York office received of those hops?

A. I think you have the records introduced. There were several [220] type samples and at some later date the tenth-bale inspection samples.

Q. Will you state why those hops were rejected by your firm on the basis of those samples.

A. Because they were badly damaged by mildew and wind whip. Also, on the first sample we received I considered them dirty picked. Later we had an analysis which showed 9 per cent.

Q. By an analysis you mean what?

A. 9 per cent leaf and stem by Government analysis.

Q. Is that the Hop Inspection Certificate?

A. Correct.

Q. When did you receive the notification of the official determination of the leaf, stem and seed content?

A. The certificate is dated the 15th. I think we were informed on the 20th by Mr. Paulus. I am not 100 per cent sure, but it was about that date. It was after we received and passed on the first type samples of hops.

Q. Then your first type sample that you received was received before you received the official Government certificate of the leaf, stem and seed content; is that right? A. Yes, sir.

Q. Did you reject the Kilian Smith late cluster hops because of any difference in the market value

(Testimony of Robert Oppenheim.)

of such hops between the time when you contracted for them and the time that they were tendered to you for delivery? [221]

A. There was no difference in the market value at that time. The market was firm.

Q. Did you reject them for any other reason than the failure to come up to contract quality and condition?

A. For no other reason whatsoever.

Q. Did you authorize Mr. C. W. Paulus to buy any hops for you in 1947 on the vines?

A. No.

Q. Do you ever buy hops as hops on the vines?

A. Never.

Q. Do you ever buy hops other than baled hops?

A. Only in the bale. That is, we buy them on future contract calling for bulk delivery, but they are a processed product and we certainly don't buy anything but the finished product in the final analysis, because—I mean the analysis of the situation, not a chemical analysis. They have to be baled and they have to be sampled and passed on before we accept them.

Q. Did you at any time authorize Mr. Paulus to buy for you or for your firm any damaged hops on term contracts?

A. No. I am not in the habit of handling damaged hops.

Q. Did you at any time authorize Mr. Paulus to buy for you or for your account or the account of your firm any diseased hops on term contracts?

(Testimony of Robert Oppenheim.)

A. No, sir. The contract states what we are buying, prime hops, with the specifications duly set forth in the contract. [222]

Q. Did you give orders to Mr. Paulus in 1947 to buy Oregon hops for you? A. Yes.

Q. And what quality or grade of hops was specified in those orders?

A. As shown in the contract, prime hops. That is the usual method of buying hops before they are baled.

Q. Some reference has been made in the record in this case, Mr. Oppenheim, about some chemical analyses of the Murphy samples. A. Yes.

Q. Can you explain that?

A. Yes. Sometime in August I was out here and we had a contract with a grower by the name of C. W. Murphy, and McNutt-Murphy, which were two or three separate yards down in Harrisburg, and his hops showed considerable blight or mildew damage. So Mr. Murphy at our request picked a bale several weeks—probably two weeks before his regular picking, and he had one bale dried and baled for us and the samples sent, because we were curious to see, if possible, what damage had been done by mildew damage to the resin content of the hops. We didn't know; it was an experimental idea to get some bearing on the mildew damage in the State of Oregon.

Q. Had you contracted with Mr. Murphy for hops on the basis of any chemical analysis? [223]

(Testimony of Robert Oppenheim.)

A. No, sir. We had his entire crop contracted at 50 cents a pound. I don't know whether it is material or not, but we rejected them when they were in the bale on account of mildew damage, several hundred bales.

Q. What did you do with the tenth-bale samples of the Kilian Smith 1947 late cluster hops which were sent to your New York office by Mr. Paulus?

A. You mean what did we do when we received them?

Q. No, what disposition has been made of them, to your knowledge?

A. They were returned here, and they are over there on that bench, except one of them was missing.

Q. Are those tenth-bale samples which are in evidence in this case? A. Yes, sir.

Q. You brought them personally, did you, into court?

A. No, they were sent by either mail or express to Mr. Paulus some weeks ago, if I am not mistaken. I don't know the exact date.

Q. The Bailiff will hand you some of the exhibits, Mr. Oppenheim. Will you refer to the first one, which I believe is Exhibit 17, a wire dated September 16th? A. Yes, sir.

Q. Would you refer to that portion thereof bearing upon this case. [224]

A. I have to start a little above where it says about Kilian Smith, because it refers to that sentence: "Cannot use Lot 62, 31 bales." That was

(Testimony of Robert Oppenheim.)

another crop. "Notify grower we refuse to accept such hops on contract. Don't want them even at lower prices. Same applies to Lot 64, 73 bales Kilian Smith which we reject. Willing to accept his fuggles basis 90 cents for 8 per cent and apply cluster advances on fuggle settlement." I think I better read the rest of it. I think it is pertinent to this. "Also reject Kuenzi Lot 54, 39 bales. If he unable refund advances advise settlement you think can be made with him. We definitely will not accept these low-grade blighted dirty picked hops on contract."

Q. That telegram was based upon an examination of what sample or samples?

A. The type samples which were received. It is our habit to have our buyers send us samples just as fast as they are baled so we get an idea of the crop. That happens every year.

Q. When you examined the first type samples in New York, Mr. Oppenheim, was it your decision at that time absolutely to reject all of the Kilian Smith hops of whatever grade they might be?

A. Well, we would reject any hops that ran up to that type sample, and we presumed that these were fairly representative, although we couldn't tell until the hops had been properly inspected and graded out, because sometimes the sample will not be representative and a lot of times it will, depending on the size of the lot and how quickly it is picked and whether it is properly mixed.

(Testimony of Robert Oppenheim.)

Q. Will you refer to the next exhibit, which I believe is Exhibit 16. A. Which is that?

Q. A letter dated September 16th, is it not? That is addressed to——

A. C. W. Paulus, Salem, Oregon.

Q. Will you refer to the portion of that letter which bears upon this case.

A. I will have to read back a little, the same as in the telegram, because it covers more than one lot. “However, on Samples 62, 31 bales, Ralph Herr, we cannot accept such hops. The analysis is only 10 per cent, but the hops look a lot worse to us than that, and not only are they dirty picked but they are blighted and the quality of hops which we cannot deliver to our customers. We therefore wired you that we would not take this lot and to so notify the grower, as we do not want to take them in even at a discount in price. We take the same stand on Lot 64, 73 bales Kilian Smith. We will not accept such hops. We suggested that you close for his fuggles on the basis of 90 cents for 8 per cent and apply the cluster advances on the fuggles settlement.”

Q. Will you read the next paragraph. [226]

A. “In dealing with growers like this, if they don’t want to deliver the fuggles without the clusters we are perfectly satisfied, with such quality clusters, to have our money refunded rather than to be forced to take in any hops we do not want.

(Testimony of Robert Oppenheim.)

This is the positive position we will maintain on all such hops."

Q. Will you read the next to the last paragraph?

A. "I think you will understand our position, for, as I explained to you, we cannot load up with hundreds of bales of hops which are not deliverable to brewers and which would be extremely difficult to sell unless the buyers must have them.

"Our contracts definitely call for a prime quality hop, free of blight and disease, and clean picked. We can safely reject all these hops on all three counts. Where they have our money, we will have to negotiate for the best possible settlement, but we want you, if possible, to get advances refunded and call the deals off in such cases."

Q. Are those parts of the letter you read in respect to Kilian Smith?

A. Yes, it mentions Kilian Smith in the letter.

Q. Will you refer to the next exhibit, which is Exhibit——

A. 18?

Q. ——18.

A. You only want the part in reference to this case?

Q. Yes, refer only to the part or parts bearing upon this case. [227]

A. This is dated September 17th, and the last part reads as follows: "Sample 64, 73 bales, 9 leaf over 6 seeds." That is the Kilian Smith lot.

Q. Is that a copy of a wire which your office received from Mr. Paulus?

A. Yes.

(Testimony of Robert Oppenheim.)

Q. Refer to Exhibit 20.

A. Plaintiff's Exhibit 20: "Referring Samples 14"—that is Kilian Smith's fuggles—"and 64"—64 is Smith's lates—"Referring Samples 14 and 64 Kilian Smith, willing accept delivery Lot 14 fuggles, but again advise you positively refuse accept delivery 73 bales Lot 64 and instruct you to reject this lot and demand refund all advances or apply same on fuggle delivery." There is further in the telegram, but it is not pertinent, I don't believe.

Q. Is that a telegram?

A. There is more in the telegram I haven't read.

Q. Does it relate to this case?

A. No, sir.

Q. Now, do you have before you Exhibit 20, which is a letter?

A. Exhibit 20? That was Exhibit 20 I just had. This next one I have is Exhibit 22, a letter from Mr. Paulus.

Q. All right. Refer to the portions of that letter which bear upon this case.

A. This is from Mr. Paulus to our office: "We acknowledge [228] your several letters and telegrams of the 12th and 16th regarding Sample 64-73 bales Kilian Smith clusters hops. You have been informed that the hops grade 9 per cent leaf and stem." This is dated the 20th of September.

"The early sample which was delivered to you of this lot is in my opinion hardly representative of the entire lot. An additional line of five samples

(Testimony of Robert Oppenheim.)

of Lot 64 was airmailed to you today for your further examination and consideration.

“To date I have not contacted this grower regarding any settlement since he gave his price selection over the telephone, which was passed on to you by wire.

“Kilian Smith is a relative of the Banker Smith family in the St. Paul section and has been a buyer of hops for a number of years for other dealers. I feel, therefore, that we will have to work out our final decision for action with him carefully and be on safe ground in any event.

“I am still hopeful that upon re-examination of these samples you might see your way clear to accept these hops on some basis and indicate to me a reasonable firm price at which you can accept the cluster hops. Yours very truly.”

Q. Do you recall that that was the first word you had from Mr. Paulus that the samples you had previously received might not be truly representative of the entire lot? A. Yes. [229]

Q. Will you examine the next exhibit in order there, Mr. Oppenheim.

A. This is my letter, copy of my letter of the 22nd.

Q. That is Exhibit 24, is it?

A. This is, yes, Plaintiff's Exhibit 24. That is right.

Q. All right. What is the date of that letter?

A. September 22nd.

(Testimony of Robert Oppenheim.)

Q. That is addressed by you to Mr. Paulus; is that right? A. That is correct.

Q. Will you refer to the portions of that letter which bear upon this case?

A. "Dear Sir: Your various letters and samples have come to hand this morning.

"Before answering any of your letters in reference to any specific lot, let me state that we will take in, in due course of business, all hops, either fuggles or clusters, which grade prime, but we will not"—that is in large type—"take in any hops which run off-grade until each and every lot is separately inspected and graded and we have tenth-bale samples from you to show us what we are getting. It is not a question of the good will of any particular grower, as we will try in every way to cooperate with both you and the grower, but we are not going to accept a lot of hops which we cannot deliver to our customers.

"We refuse to tie ourselves up with hundreds of bales [230] of very poor hops or make any adjustments on any contract delivery until we know what we are getting and what we can do with such hops. This goes for Banker Smith's family or any other influential or non-influential hop grower in the State of Oregon. It is our money that is being jeopardized, and we have no intention of being forced into any quick deliveries or acceptances."

Q. Now, was that reference in that letter a reference to the letter which you previously read from Mr. Paulus to you?

(Testimony of Robert Oppenheim.)

A. Yes. It evidently is in answer to his letter of the 20th, September 20th.

Q. Are there any other portions of that particular letter which are pertinent?

A. The bottom paragraph on this page: "Regarding the Kilian Smith lot, the fuggles are, in our opinion, definitely slack. The lates we do not like at all. They are very poor quality. If you want to arrange to have these hops inspected and graded, and advise us if they are in sound condition, you may do so, and after we have seen tenth-bale samples we can see what can be done. However, we are making no promises regarding acceptances of such hops."

I think that is about all that covers Kilian Smith.

Q. The next exhibit, Mr. Oppenheim.

A. Our wire which we sent on November 25th at 3:33 p.m.

Q. November 25th? [231]

A. September 25th. Do you want me to read that?

Q. What is the exhibit number?

A. I don't see anything here that indicates it.

Q. We will pass that by, Mr. Oppenheim. What is the next exhibit?

A. Exhibit 22, Plaintiff's Exhibit 22. Do you want that read?

Q. What is that?

(Testimony of Robert Oppenheim.)

A. It is a telegram which we sent to C. W. Paulus on September 30th.

Q. Are you sure you have the correct exhibit number?

A. It says Plaintiff's Exhibit No. 22. Then there is something on the bottom, Plaintiff's Exhibit 26.

Q. When you refer to the exhibit number be sure and check it with the number 4083 which appears above it. This is Exhibit No. 26; is that right?

A. Yes.

Q. How does that relate to the Kilian Smith hops?

A. Well, I would like to read it, if I may.

Q. Very well.

A. "Referring to samples which we have accepted as being satisfactory for delivery, we caution and instruct you to inspect all lots carefully and throw out any bales which do not run fully up to samples or are in your opinion not a prime delivery. We consider hops containing considerable blighted burrs as unsatisfactory delivery." [232]

Q. That was a telegram addressed by you to C. W. Paulus on September 30, 1947?

A. September 30, sent from New York at 12:01 p.m.

Q. What was the prevailing market price for Oregon late cluster hops at that time?

A. 85 cents for prime hops.

Q. Will you examine the next exhibit, please.

A. This is Exhibit 28, dated October 16, from

(Testimony of Robert Oppenheim.)

New York to Paulus: "Received tenth-bale samples Lot 64, 73 bales Kilian Smith clusters. These hops blighted and off-grade, dirty picked and not prime delivery. Reject and secure refund of advances."

Q. Are those the first instructions you gave to Mr. Paulus relative to the Kilian Smith hops after you had received and examined the tenth-bale samples of his hops?

A. Yes. We evidently received them that morning, and I presume that afternoon we went through them. I am surmising that, however.

Q. What was the prevailing price between dealer and grower?

A. Still unchanged; 85 cents for prime hops.

Q. That was on October 16th that it was unchanged? A. Yes, sir.

Q. Will you refer to the next exhibit.

A. Exhibit 29.

Q. 29?

A. That is also dated October 16th.

Q. Is that a letter?

A. This is a letter to Mr. Paulus: "Dear Sir: We have just [233] received and gone through seven samples of your Lot 64 representing 73 bales of the Kilian Smith crop of cluster hops.

"These hops are badly blighted, off-grade, dirty picked and not a prime delivery.

"We are therefore compelled to reject them under the terms of our contract, and request that you so

(Testimony of Robert Oppenheim.)

notify the grower and demand refund of our advances."

Q. That is a confirmation, is it, of the telegram of the same date that you previously read?

A. Yes. It has one added paragraph there, I believe. Well, it is a little more specific; that is all.

Q. What do you mean by the term "off-grade" as used in that letter?

A. Not a prime hop.

Q. Will you now refer to the next exhibit, which I believe is 30?

A. That is right. The bottom part of the telegram, which contains other matters: "Try arrange prompt delivery Kilian Smith fuggles and deduct cluster advances as cannot use clusters and positively reject." This is dated the 22nd of October.

Q. Will you refer to the next exhibit.

A. Exhibit 31, copy of a telegram sent by Mr. Paulus, Salem, Oregon, October 22: "Kilian Smith reported twentieth had not delivered his 20,000-pound fuggle contract to Seavey. He still interested sell these hops since Seavey delivery appears doubtful [234] and buyer encourages sale. Your purchase these hops may ease settlement your cluster advances and also expedite delivery your fuggle contract and shipment which now delayed pending Seavey action." I think there is an answer to that in 32.

Q. And your next exhibit is 32.

A. Telegram from us to Paulus, the same day—

(Testimony of Robert Oppenheim.)

no, the 23rd, the next day. The other evidently was a night letter and received on the 23rd in New York. "Not interested buying Kilian Smith fuggles. Make every effort to arrange with him to set aside 20,000 pounds for Seavey delivery and deliver balance to us to clean up our contract. We stand on our rejection clusters and insist upon repayment cluster advances from balance money due on fuggles."

Q. Does that where you have just read constitute your reply to the previous day's wire which you read from Mr. Paulus?

A. Yes, sir; undoubtedly.

Q. Now the next letter, which is Plaintiff's Exhibit 34, you need not read that.

A. You want me to read that?

Q. No. State whether that was intended as a confirmation of your wire of the same day which you did read?

A. Yes.

Q. Do you have Exhibit 50 there?

A. Yes, sir.

Q. What is that? [235]

A. This is a copy of a letter from Mr. C. W. Paulus dated—this is the office copy, I would say, of it.

Q. Is that a copy of a letter which you received?

A. Yes, undoubtedly we must have it in our files.

Q. From Mr. Paulus?

A. Yes. You want me to read it?

(Testimony of Robert Oppenheim.)

Q. Yes, please.

A. "We were able to make settlement with Kilian Smith on the basis of your request and have taken delivery of his 59 bales fuggles and have applied the proceeds against all of the advances, both fuggle and cluster crops which were due." Then further in that paragraph there is something which has no bearing on the Kilian Smith matter. I have another exhibit here which doesn't seem to be pertinent.

Q. What is the number of that?

A. 49. It simply states the same thing over again.

Q. Exhibit 49 is a letter confirming—that is a letter from whom?

A. From us to Mr. Paulus.

Q. And what is that letter?

A. Well, after the first paragraph here: "Referring to your letter of the 20th in reference to the Kilian Smith lot, as we wired you today, you are instructed"—that simply instructs and is a confirmation of our wire about the fuggles.

Q. Very well. Do the correspondence and telegraphic exchanges [236] which you have read state the actual reasons for the rejection by your company of the Kilian Smith late cluster hops?

A. I think they say so in the strongest possible language.

Q. And do they correctly state the actual reasons for that rejection?

A. Yes, sir.

(Testimony of Robert Oppenheim.)

Q. Was any of that correspondence or any of those communications communicated with any idea of a possible lawsuit over those hops?

A. None whatsoever. We never had a lawsuit in our history until these present two cases. I am not in the habit of preparing for lawsuits. I have been in business forty-eight years without one.

Q. Do you acknowledge that the rejection of hops is ordinarily a rather tragic matter for both—

A. It is something we hate to do. Until we had this situation in 1947, of the tremendous damage to the quality at picking time, we had never had any rejections that, as I testified I think in the Geschwill case, amounted to a row of pins, except maybe an occasional odd bale of hops that were damaged in the handling, or high-dried or slack-dried, which is expected in any business transaction in hops. I might add, Mr. Kerr, we buy hops for delivery to our customers. We don't buy them to reject them.

Q. Could you have delivered those hops to your customers under [237] a contract that required prime delivery?

A. Not blighted hops. They were so bad the brewing value is definitely low, although I couldn't tell you how low because, as I say, we don't sell hops on any chemical analysis. But any competent judge of hops knows that when hops are blighted they have lost some of their value, and they have certainly lost their looks, and they have lost some of their flavor. The blighted ones, the burrs may be

(Testimony of Robert Oppenheim.)

perfectly fine, but the blighted ones are definitely off-quality for flavor.

Q. Have you experienced a definite dislike by brewers of diseased hops or blighted hops?

A. Well, after all, the brewing industry is highly competitive, and practically every brewer stresses the point that he buys only the best materials, and I don't think any of them would at any time want to be accused of buying off-grade hops. They may have taken them of necessity when they couldn't get anything else during a scarcity of hops during the war period, but in the normal course of events our customers don't want anything but the very finest hops we can secure for them. And I think that goes for the entire brewing industry and other dealers as well as myself. We are not specialists in any better than ordinary hops. We are handling the same hops as the other people do.

Q. Have brewers indicated to you that they fear that hops affected by mildew might affect the flavor of their brew? [238]

A. Well, I don't recall any specific instance, but I know that the minute I do submit some off-grade samples the brewmaster or the boss would throw them up to us and say, "I am not going to use those"—I was going to use a cuss word—he would say, "We can't use such hops for our beer. We would spoil the beer."

Mr. Kerr: That is all, Mr. Oppenheim.

(Testimony of Robert Oppenheim.)

Cross-Examination

By Mr. Dougherty:

Q. Mr. Oppenheim, do I understand that along about August, 1947, it looked to you as if you would be short on your contracts?

A. I would say that some of our deliveries on our contracts would be short, because the yards indicated that they would be unable to pick all the hops. We had definitely some short deliveries on our contracts, and we were definitely assured at that date that a lot of hops—for instance, the Murphy hops that I mentioned before—would not be suitable for prime delivery to our customers. We knew we couldn't dispose of those hops to our customers on our contract demands. We have to deliver good hops to our trade.

Q. Do you sell your hops to brewers as prime hops?

A. Well, we call them prime hops, or we often call them choice hops, too. A choice hop, as I have always understood, to a [239] brewer is the same as a prime hop on the Pacific Coast, because there is no fixed standard, no Government standard. We are an old-time house, and that was customary when I was a boy and got into business. Our concern always called them choice. Other people call them prime. It is just a matter of custom.

Q. There are no fixed standards for these terms?

A. Pardon me?

(Testimony of Robert Oppenheim.)

Q. There are no fixed standards for these terms?

A. No, sir.

Q. Why did you decide to buy some additional hops in Oregon in 1947?

A. Well, I believe at that time it was impossible to buy anything in Yakima or in California, I believe. I believe the crop was practically sold out. That is my recollection.

Q. Almost completely contracted; is that correct?

A. That is correct.

Q. When you were here in 1947, Mr. Oppenheim, did you know that there was downy mildew in the Valley?

A. It was apparent to anybody with eyesight.

Q. Were you out looking at some yards with Mr. Fry, who testified here today?

A. I think I testified in the Geschwill case that I covered a great part of the Valley here, and I was taken out by Mr. Paulus and I am sure once or twice by Mr. Fry. I would say Yes, to the best of my recollection. [240]

Q. Do you recollect Mr. Paulus mentioning the matter of the Smith fuggles and clusters to you at that time?

A. Not definitely; no, sir. All I know is that I gave him orders to buy a few hundred bales additional of hops, and we agreed to take clusters as well as fuggles. That is the best of my knowledge. But the Kilian Smith lot, as far as I can recollect, was never specifically mentioned.

(Testimony of Robert Oppenheim.)

Q. Were you primarily interested in obtaining fuggles?

A. Fuggles in preference to clusters, because the fuggles were free of disease. But we take more clusters or handle more clusters than we do fuggles, as a rule.

Q. The fuggles, as I understand it, are most resistant to mildew; is that correct?

A. Yes, sir; I would say that the fuggle crop was practically free of disease, free of mildew damage.

Q. Did you contract some additional clusters in the case of growers who wanted to sell both their fuggles and clusters together?

A. Well, I don't know without referring to the records. The only two I would know at the moment were the Geschwill and the Kilian Smith. There may have been others. I wouldn't state "Yes" or "No" because I don't know at the present time without referring to the records.

Q. Did Mr. Fry or Mr. Paulus report to you that there was mildew in the Smith yard? [241]

A. Not that I can remember.

Q. Did you know that there was mildew generally in yards in that area?

A. Yes, but there were a lot of yards that were practically free of downy mildew. There were quite a few yards in Oregon that produced prime cluster hops. We took a lot of them in ourselves.

Q. Did you ever examine Mr. Smith's hops in the yard? A. No, sir.

(Testimony of Robert Oppenheim.)

Q. Did you feel free to do so had you wanted to?

A. I presume I was at liberty to go anywhere in the state. Nobody ever kept me out of a hop-yard yet.

Q. It is common practice, isn't it?

A. Yes, it is common practice to go in and out of the hopyards without even asking permission. We would drive in and around and out.

Q. Did you ever examine Mr. Smith's hops in the warehouse?

A. No, sir. I never saw the bales. I have never seen any of them except the samples that were sent to New York. Please remember that in September, October and November I am a pretty busy man in New York, because we have to make our deliveries, we have to take care of our finances—that is our busy season. It is all one big peak. We do most of our business in three months. Practically 95 per cent of our whole year's business is done in three months. [242]

Q. Do I understand, then, that you never talked to Mr. Smith about this?

A. No, sir; I have never seen him until I saw him in court here. That is, to my knowledge. I may have seen him and not known him.

Q. I would like you to look at Exhibits 43 and 45-A, if you will, please, Mr. Oppenheim, and after examining those will you tell us when you first received a type sample of the Kilian Smith 1947 clusters.

(Testimony of Robert Oppenheim.)

A. Well, both these sample advices from Mr. Paulus are dated the 10th of September, and one is marked received on the 12th in pencil here, evidently put on by Mr. Sheridan. That looks like his handwriting to me. So the sample of Lot 64, one sample, Lot 64, representing 73 bales of clusters, 1947 Kilian Smith crop, so marked on there, that was received on the 12th, and the other sample by express on the 14th.

Q. The 14th of what month?

A. Of September.

Q. Of September, Mr. Oppenheim?

A. It says 9-10-47. There is evidently some mistake on this, because the sample notice is marked September 10th, and it has on the bottom, "Received 10-14," which evidently is a clerical error. Anybody can make a mistake like that, I would say. We certainly didn't receive these hops a month later. It doesn't take that long to get to New York. [243]

Q. Is there a notation by Mr. Sheridan at the bottom of that which might indicate——

A. There may be: "This package was held up by strike." Oh, I guess maybe it is correct, then. There was an express strike at that time, now that I see that notation. I wouldn't have believed it otherwise. So we only received one sample, then, instead of two at the time in early September. That is correct. This proves that and refreshes my memory.

(Testimony of Robert Oppenheim.)

Q. On examination of that one type sample which you received was it your impression at that time that the hops were dirty picked?

A. Yes. I definitely wired that and I explained it to Mr. Kerr a while back.

Q. Although the official analysis showed 9 per cent?

A. We didn't know the official analysis until later. And very often, I may state, our judgment varies from the actual out-turn on analysis. Some times we think they are cleaner picked than the analysis shows, and sometimes we think they are dirtier picked, but we have to be bound as far as our contracts are concerned by the official analysis as stated in our contracts.

Q. But, as I understand, the 9 per cent pick under this contract was permissible?

A. It was permissible. There was an 8 per cent contract with tolerances up to 10 per cent, and a deduction of one cent each one per cent additional leaf and stem. That is the common form [244] we have been using in the last year or so.

Q. Then, as I recollect, it was on September 16th that you sent your telegram of rejection; is that correct?

A. I think that is—yes, that is the date. I am sure it is.

Q. That was before you had received the official picking analysis?

A. I think I have already testified before that

(Testimony of Robert Oppenheim.)

it was on the 20th that we had a wire from Paulus.

Q. Is it your practice to reject hops before they are tendered on the basis of one type sample, Mr. Oppenheim?

A. Well, I wouldn't call it a rejection. It is simply that we reject on the basis of that sample, because that is, as I testified, a type sample and the word "type" does more or less express—it is supposed to represent the entire lot, but until they are actually examined bale for bale I would not consider a type sample as representative of the entire lot. That would be a very unfair position to take.

Q. In your opinion that would be unfair?

A. Yes, but, nevertheless, a type sample may show—may be representative of the entire lot.

Q. Then do I understand in your correspondence with Mr. Paulus, when you used such terms as "We absolutely reject," or "We positively refuse to accept"—

A. On the basis of those samples, yes. If the hops ran like those samples we don't want them, period. [245]

Q. So, as I understand it, at the time that there was a complete inspection of the hops in the warehouse your orders were to reject them?

A. Pardon me?

Q. At the time that the hops were actually inspected in the warehouse your orders at that time were to reject them?

A. Not until we had passed upon the tenth-bale

(Testimony of Robert Oppenheim.)

samples in New York, and I think the correspondence clearly shows that.

Q. You made that decision, did you, after Mr. Paulus had urged you to make a fair settlement in the matter?

A. Mr. Paulus as a buyer is in a position of trying to make the best possible settlements for the growers who are, after all, his bread and butter. Naturally he urges us to make the best possible settlements in the interests of—in our own interests and in the interests of the growers, and I think that is the position that anybody who is in the middle is bound to take if he wants to keep the respect of both parties.

Q. You said that the brewing value of these mildewed hops was impaired because they were mildewed.

A. Well, a mildewed burr is shriveled up, or partly shriveled up—I don't say that the brewing value of the completely matured cone which is a little red on the outside is seriously hurt, but any damage more than that superficial damage, as you might call it, is definitely impairing the brewing value of the sample. Now, a comparison of those impaired hops would determine [246]—the percentage of impairment of each blossom or burr would determine how much the brewing value might be damaged. But that is something that I can't testify to except that it is common sense. That is all I can tell you about that.

(Testimony of Robert Oppenheim.)

Q. What was the result of the Schwarz analysis of the Murphy mildewed hops?

Mr. Kerr: May our previous objection to that line of testimony be applicable to this question?

The Court: You may answer, subject to the objection.

A. I haven't got any record of that with me. I don't remember, but it was definitely impaired as compared with a prime, fully matured, ripe hop.

Q. (By Mr. Dougherty): Is the brewing value a matter subject to chemical analysis?

A. Only as to the resin content, the Alpha, Beta and Gamma resins in the hops. I am no brewmaster, I am no chemist, but I am just an old-time hop man. We go by looks and flavor and things like that. I can't testify as to any technical end of that. I wouldn't presume to.

Q. On this matter of flavor, do I understand that the flavor is usually produced by these resins? Is that correct?

A. Well, I don't know. I couldn't say "Yes" or "No." There are volatile oils in the hops which also probably have something to do with the flavor. I don't know. Again, I couldn't give you any better answer than that. [247]

Q. Is this resin in the lupulin? Is that correct?

A. Well, the lupulin contains—probably there is a greater portion of the resins. Again, I qualify my answer that I don't know positively, just hear-

(Testimony of Robert Oppenheim.)

say and from experience, going around to the brewers and hearing conversations; and beyond that I don't know.

Q. It is a matter that brewers do know about and take some interest in; is that correct?

A. Some brewers don't make any examination. I would say the bulk of the brewers—I think there are about 420 active brewers in the United States, and I would say probably 300 or 320—this is again a guess on my part—make no chemical analyses of their hops. There are certain concerns that make laboratory tests, undoubtedly.

Q. I believe you said the other day—correct me if I am wrong—that some of the larger brewers and growers maintained their own laboratories?

A. I would say that all of the larger and some of the smaller ones have their own laboratories. It is becoming more and more so.

Q. I believe that in your correspondence the stated ground for rejecting Mr. Smith's clusters was that they were badly blighted.

A. Well, badly blighted means mildew damage. It is the blight from the mildew.

Q. You were here when Dr. Hoerner testified?

A. Yes, sir.

Q. He testified that any burr which showed the slightest trace of mildew on one petal was in his classification an infected burr. Now, do I understand you to say that such a burr, where there is just a slight trace of mildew on a petal, the brewing quality of that probably would not be affected?

(Testimony of Robert Oppenheim.)

A. That would be my judgment, that the hop outside of a little discoloration on the outside is not seriously damaged. If they were all like that, the damage would be considered very slight and probably would not impair the value of the hops or the brewing value, as you express it.

Q. You stated, I believe, in some of this correspondence that you read, Mr. Oppenheim, that it was your money which was being jeopardized.

A. Well, I mean our money, the corporation's money, in which I am the principal stockholder. I sort of consider it my own business.

Q. But actually in this case you took that money back from Mr. Smith, didn't you?

A. Yes, but only because he returned it. We gave it to him, and he is welcome to it at any time he wants it. It is there ready for him. At the present time we feel we owe Mr. Smith some three or four odd hundred dollars, whatever the exact amount of that check is. We definitely have that as a liability on our books. We will be glad to pay him the money tomorrow [249] if he wants it.

Q. On that check it says "Balance on contract delivery 59 bales of fuggles."

A. That is in line with the letter which Mr. Paulus sent us. He made settlement on that basis, and that was a complete settlement of the contract, so I understand.

Q. Have you ever offered Mr. Smith a check in the same amount not bearing such a prejudicial notation?

(Testimony of Robert Oppenheim.)

A. I couldn't answer that. Possibly Mr. Paulus has, but I don't think so, because he refused to take it and the next thing we knew we were notified we were being sued. This matter is out of my hands, you might say. I mean then I have to get my own attorneys to protect my own interests.

Q. In connection with that, Mr. Oppenheim, isn't it a fact that on or about November 24th, 1947, you received a letter setting forth Mr. Smith's position?

A. I believe a letter from your concern.

Q. Did you ever reply to that letter?

A. I don't know. I referred it to my attorney, and from then on I don't know what happened. I couldn't testify, because my recollection isn't—

Mr. Kerr: I wonder if Counsel will stipulate that Mr. Shields of Counsel's office and myself, as counsel for the defendant, conferred in response to that letter, and with respect to this particular check agreed that it would be stipulated and understood that [250] the defendant was making a continuing tender of the amount of the check, which is Exhibit No. 9 in this case.

Mr. Kester: A continuing tender subject to the terms stated on the check.

Mr. Kerr: Nothing was said about terms.

Mr. Dougherty: Will you tell us when this conversation was, Mr. Kerr?

Mr. Kerr: I don't have the office record with me. I could determine that. So could Mr. Shields.

The Court: Continue with the examination.

Mr. Dougherty: Thank you, Mr. Oppenheim.

(Testimony of Robert Oppenheim.)

Redirect Examination

By Mr. Kerr:

Q. Mr. Oppenheim, if making a term contract or contracting for hops to be harvested and baled from a yard in which there is some mildew at the time the contract is made is to constitute an obligation by the buyer under that contract to take mildew-damaged hops, would you make term contracts on Oregon hops? A. I should say not.

Q. Why not?

A. Well, because we would be obligating ourselves to take hops which we couldn't handle to our customers. We would go broke in a year or two if we did that. [251]

Q. Does the appearance of the hops affect the marketability of those hops to brewers?

A. Definitely.

Q. Does the presence or evidence of damage by mildew infestation affect the appearance of those hops so far as the brewer's buyer is concerned?

A. Oh, absolutely, because, as I have already testified, probably the greatest portion of hops sold, when sold on actual sample, are picked out by samples tendered to brewers, and the first thing they do, if they see a hop which looks bad, they shove it aside and say, "Can't use it in my beer; it would spoil it."

Q. Now, if a brewer notes some mildew damage in a sample of hops which you tender to that brewer as a sample of possible delivery, what has been your

(Testimony of Robert Oppenheim.)

experience with respect to the reaction of that brewer to that sample?

A. I think my last answer covered that.

Q. Has that brewer become suspicious of possible further damage?

A. I would say that in 1947 the market was high, and the cause of the rapid rise in the market was the extent of mildew damage, which was widely broadcast throughout the entire brewing trade. I think the brewing industry was alert to mildewed hops, and scared to death of them, afraid they might spoil their beer and their reputation.

Q. You referred to laboratory tests made by some brewers of [252] hops which they used in their brew. Do you know whether or not those laboratory tests are for the purpose of determining the hop ratio; that is to say—

A. Well, that would be one of the reasons for it, because they use a certain amount of hops per barrel, which varies with every brewer. I presume that the large brewers probably regulate the use of their hops by laboratory examinations of the hard and soft resins, the Alpha, Beta and Gamma resins, and if they have hops that run excessively high in resins they would use less, and if they ran low in resins they would use more per barrel. They probably have the strictest kind of chemical control in their plant from top to bottom. They are scrupulous about those things. Smaller brewers and the less strong financial brewers—although some of the small ones are still very good—are probably not so

(Testimony of Robert Oppenheim.)

fussy—"fussy" may not be the right word—not so particular about their handling. But that is all hearsay. I couldn't give you a positive statement, because I have never had anything to do with that end of the business.

Mr. Kerr: That is all. Thank you.

Recross-Examination

By Mr. Dougherty:

Q. Just one or two other matters. Mr. Oppenheim, did you ever discuss with Mr. Smith your problems in selling hops to [253] brewers?

A. With Mr. Smith?

Q. Yes. A. Not that I know of.

Q. What effect did the grain restrictions in the fall of '47 have on the sale of hops?

A. I don't think the over-all picture was very bad. There was a rush to brew heavily. I think November of 1947 was an extraordinarily big month for brewing, because every brewer in the United States pushed their brewing so as to have more beer in the cellars in case the grain restrictions went into effect. I don't believe, though, that seriously hurt the sale of the beer, because the beer sales went up and up and up.

Q. It was felt at that time that it might affect—

A. Yes, definitely, they were worried about their production of beer.

Q. Is there some sort of ratio between the use of grain and the use of hops?

A. I wouldn't think so, no, because, in the first place, barley or malt is not the only ingredient that

(Testimony of Robert Oppenheim.)

goes into the beer. That is, there are substitutes. There are corn products. When there was a scarcity of grain, they imported tremendous quantities of Manioc flour from Brazil, which was used as a substitute. And they used molasses and they used sugar and whatever they could lay their hands on. That is why some of the beer was not [254] so good during those restricted periods.

Q. Has there been any change in the tariffs on hops?

A. Yes, the tariff on hops was reduced from 24 cents a pound to 12 cents a pound sometime—during the year 1948, I think it was.

Q. Was that in the spring of '48?

A. That is my guess. I don't know positively.

Q. So that, as I understand it, the imported hops pay a lower tariff—

A. Yes. Naturally, anything that pays a tariff is imported.

Mr. Dougherty: Thank you. That is all.

(Witness excused.)

Mr. Hill: If the Court please, we request leave of the Court to amend our answer in the minor particulars in which the amendment was made in the Geschwill case.

Mr. Kester: I don't know exactly what that will be, but I don't imagine there will be any objection.

The Court: It may be done.

Mr. Kerr: Defendant rests, your Honor.

Mr. Kester: If the Court please, I am advised

that a witness just came into the courtroom that I have not had a chance to talk to.

The Court: Have you no other witness? [255]

KILIAN W. SMITH

the Plaintiff herein, was thereupon recalled as a witness in his own behalf, in rebuttal, and was further examined and testified as follows:

Direct Examination

By Mr. Dougherty:

Q. Mr. Smith, there has been some reference here to selective picking. Would you tell us as a practical matter how your yard in 1947 was picked?

A. Well, it was picked principally by the pickers. They were after the biggest hops they could get.

The Court: That has all been covered over and over.

Q. (By Mr. Dougherty): With reference to the matter of the check which stated that it was the balance due for fuggles, did you accept that check as the balance due on that contract?

A. I took it because it was all Mr. Byers could do under the circumstances.

Q. And you didn't cash it?

A. I wasn't in agreement with the way they had treated me.

Q. In connection with taking in your fuggles, when Mr. Byers told you that he could only look at the fuggles if you agreed to deduct the advances, what did you tell him at that time?

(Testimony of Kilian W. Smith.)

A. I told him I thought it wasn't a very good deal. He said there was nothing he could do about it.

Mr. Dougherty: You may inquire. [256]

Cross-Examination

By Mr. Kerr:

Q. Is that the language that Mr. Byers used at the time, that he could look at the fuggles only if you agreed to the deduction of the advances on the clusters, or did he use some other terms?

A. He says he couldn't take them in; he couldn't weigh them in.

Mr. Kerr: That is all. Thank you.

(Witness excused.) [257]

D. E. BULLIS

was thereupon produced as a witness in behalf of the Plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kester:

Q. Your name is D. E. Bullis?

A. Yes, sir.

Q. Where do you live, Mr. Bullis?

A. Corvallis.

Q. What is your occupation?

A. Chemist in the Experiment Station.

Q. You are a chemist in the Experiment Station at the Oregon State College?

A. That is right.

(Testimony of D. E. Bullis.)

Q. What has been your training in chemistry?

A. Bachelor's degree in Chemical Engineering and Master's degree in Agricultural Chemistry.

Q. Where did you get your degree?

A. Oregon State College.

Q. About when did you get your training?

A. The Bachelor's degree was obtained in 1917 and Master's degree in 1929.

Q. Have you specialized in agricultural chemistry all that time? A. I have.

Q. How long have you been associated with the Oregon State [258] College? A. Since 1917.

Q. What is your particular field of activity there? A. Largely food products.

Q. What type of work does that include?

A. That includes fruit, frozen foods and vegetables, and it has included considerable work on hops, work on peppermint, and products of that nature.

Q. What type of work do you do in respect to hops?

A. Our department has been concerned with work on methods of analysis, largely, and development of new methods of analysis. In addition to that, we have done some service work on analyses of samples for resin content.

Q. How long have you been working on methods of analyses of hops?

A. I should say since about 1934 or '35 is when it started.

(Testimony of D. E. Bullis.)

Q. Since then you have had a continuous program in an effort to develop methods in analyzing hops?

A. Up until the early years of the war. Since that time the work has been more or less discontinued; that is, temporarily at least.

Q. For whom do you make such analyses?

A. We have made analyses of commercial samples for various dealers and various growers in the State of Oregon. In connection with some of our research work we have analyzed commercial [259] samples from the State of California and from Washington.

Q. In your work has it been part of your duties to be familiar with the literature in the field of chemical analyses of hops? A. It has.

Q. Were you instrumental in setting up the laboratory in Salem for the Pacific Hop Growers a number of years ago? A. I was.

Q. You also helped set up the laboratory and put it in operation? A. That is right.

Q. That was a laboratory that made this type of analysis for hop growers, was it not; growers and dealers, as a matter of fact?

A. I believe so, or at least those associated with that particular organization.

Q. On request do you make chemical analyses of hop samples sent to you?

A. We have in a few instances. Recently we are getting out of that phase of the service.

(Testimony of D. E. Bullis.)

Q. You are not doing that so much any more?

A. That is right.

Q. Over the years, though, it has been a recognized field of activity, making chemical analyses of hop samples?

A. At the time the service for analysis of seeds and leaves and stems was set up by the State College we also gave service [260] on chemical analyses, largely because there were no other laboratories available in the area where that could be obtained; and, secondly, because the information that we derived from that work was useful to us in our research program.

Q. Since that time other laboratories have developed which are doing similar work?

A. Some laboratories are, I think, as far as the leaf, seed and stem analysis is concerned. Of course, The State Departments of Agriculture now take care of that.

Q. From your experience in the analysis of hops you recognize, and of course it is common knowledge, that the soft resins of hops found in the lupulin are what go to make the flavor in the beer? That is common knowledge, isn't it?

Mr. Kerr: If the Court please, may the record show that all of the testimony relative to the resin contents or brewing qualities or chemical qualities of hops is going in over our objection on the ground that it is irrelevant. I believe Counsel made some reference yesterday or the day before to some

(Testimony of D. E. Bullis.)

decision of the United States District Court for this District on that subject. We are prepared to argue that point if the Court so desires. It is our view that that case is wholly and entirely not in point.

The Court: I am admitting it without regard to that case, which I have not examined, but admitting it subject to the objection which you just stated. Answer the question. Do you [261] have the question in mind? A. No.

Mr. Kester: Will you read it.

(Last question read.)

A. There are other constituents besides the soft resins.

Q. Would you explain that. What are the constituent elements that go to make up—

A. The hop oils have a lot to do with aroma and flavor. The soft resins, I believe, are considered constituents, the constituent which imparts the bitterness to beer.

Q. So that the volatile oils and soft resins are the desirable parts of the hop from the standpoint of making beer; is that right? A. I think so.

Q. And are those both found in the lupulin of the hop? A. Not entirely.

Q. Where?

A. You will find the resins and some oil also in the petals of the cone. It doesn't all reside in the lupulin itself.

Q. But the bulk of it is in the lupulin?

A. I believe that is correct.

(Testimony of D. E. Bullis.)

Q. Now, are your methods of analysis designed for the purpose of determining the amount or percentage of soft resins in the hops? A. Yes.

Q. Is that done by recognized chemical procedures? A. It is.

Q. Are there various different methods for arriving at that? A. There are.

Q. Do they, generally speaking, give somewhat equivalent results? A. Reasonably so.

Q. Now, with respect to the 1947 crop of Oregon cluster hops, did you have occasion to make a number of analyses of various commercial lots?

A. I did.

Q. I will ask the Bailiff to hand you three exhibits, Nos. 25, 36 and 37, so that you may have those before you. Referring to all of them generally, are those written reports signed by you giving the results of the chemical analyses of various lots of hops? A. Yes.

Q. Now, your report of September 20 there, that is one that was requested by the office of Mr. Paulus; is that right? A. I believe so.

Q. Will you look down the list—I think there are some twelve different commercial lots referred to there—will you look down the list until you find Sample No. 64, and then will you state for us, refreshing your recollection on it from that report, what the result was of your analysis of that sample of the Smith cluster hops. [263]

A. This is Sample 64 that you refer to?

(Testimony of D. E. Bullis.)

Q. Yes. A. You want that data read?

Q. Is that the one that has the name "Smith" written after it there? A. It does here.

Q. Will you give us those results, please.

A. The Alpha resin was 4.81 per cent; Beta resin, 8.75 per cent; preservative value, 67.3.

Q. Now, there is a reference there to Alpha resins and Beta resin. What are the Alpha and Beta resins?

A. They are two fractions of soft resins. Actually, the Alpha fraction is a bitter acid and it is very commonly termed Alpha resin. In our chemical analyses we are able to separate the two soft resin constituents and from them we are able by a certain chemical reaction to further remove the Alpha fraction. From the difference of the two, then, we are able to obtain what we term the Beta fraction, which is composed of a Beta bitter acid and several different resin constituents. It is not one compound. The Alpha resin is a chemical identity of a single compound.

Q. Then is it correct to say that the Alpha resin and the Beta resin together make up the soft resins?

A. They constitute the soft resins of the hop.

Q. Is there also a hard resin in the hop? [264]

A. Yes.

Q. That is called the Gamma resin?

A. Gamma or hard resin.

Q. Yes. Is that of any commercial value in the making of beer? A. No, it is considered not.

(Testimony of D. E. Bullis.)

Q. So you don't make any analysis to determine that?

A. We have on occasion. In these particular analyses, why, we didn't.

Q. How did you arrive at the preservative value figure which is there?

A. The preservative value is one index of the quality of the hop from a chemical standpoint, and it is arrived at by taking the percentage of Alpha resins and adding to that one-third of the percentage of Beta, and multiplying that sum by 10. It gives just a convenient index for indicating the quality from the standpoint of the antiseptic properties of those soft resins.

Q. I see. And the antiseptic property is one of the things that makes the beer keep; is that right?

A. That is correct.

Q. So that that is an index of some value in determining the quality of the hop; is that correct?

A. It is considered so.

Q. Now, will you look at the next report there, which is dated [265] January 15th, 1948. I will ask you if that is the report of an analysis made to Mr. Smith of a batch of his '47 hops?

A. Yes.

Q. Would you give us, likewise, the results of that examination.

A. The Alpha resin, 5.05 per cent; Beta resin, 9.55 per cent; preservative value, 82.3.

Q. Would you then look at the report of January 30, and, looking at the first part of that report,

(Testimony of D. E. Bullis.)

give us the results of that examination of a sample of his 1947 clusters.

A. Alpha resin, 4.36; Beta resin, 9.63; preservative value, 75.7.

Q. Now, referring down further in that report of January 30, and with these figures before you as to the results of three different samples from Mr. Smith's 1947 hops, how would you say that those figures compared with the average of the commercial lots of 1947 Oregon clusters which you had occasion to make such tests of?

A. Why, they run very close to that average value, I would say.

Q. The particular figure given in that letter of January 30, is there any comment there with respect to how that compares with the average?

A. I don't believe there is. I don't see it.

Q. Would you state into the record what the average of such analyses for Oregon was? [266]

A. For 1947 samples?

Q. For 1947, yes.

A. Of 29 commercial lots which we had occasion to test from the 1947 crop, the average values were: Alpha resins, 4.61; Beta resins, 8.75; preservative value, 75.3.

Q. How do those compare with the figures in that same report given for his hops?

A. They are somewhat lower.

Q. So that his hops analyzed somewhat higher than the average?

(Testimony of D. E. Bullis.)

A. That particular sample did.

Q. Yes. The other samples didn't give quite exactly the same results. Would you say that it would be fair to take an average of the three different tests that were made? Would that give a true picture?

A. I would have to know how the samples were drawn before I could answer that question.

Q. Well, assuming that the samples——

A. If the samples were properly drawn, representing the proper number of bales for sampling a lot, I should think an average of the three values would be all right to accept as representing the samples.

Q. I see. So that from the standpoint of chemical analyses, the average of those three different tests would be approximately the same as the average of the 1947 crop that you tested; is that correct?

A. I believe that would be calculated to about that, yes.

Q. And you had occasion to examine at least 29 commercial lots in 1947?

A. Yes. I had occasion to examine 29 lots up to the time this letter had been written.

Q. Do you know if you examined other lots?

A. I think we examined some after that.

Q. Do you know if they gave any results that would change materially these figures?

A. I believe they would not.

(Testimony of D. E. Bullis.)

Q. Now, one more thing, Mr. Bullis: You came here under subpoena today, did you not?

A. Yes.

Q. Let's see. You were asked previously to come yesterday?

A. That is right.

Q. Would you just tell us why you were unable to get here yesterday?

A. I called up Dean Schoenfeld, who is my employer, you might say, and asked him regarding coming up here to testify before this Court, and he said that the regulations were that none of the employees there were to accept such a summons unless accompanied by subpoena.

Q. And then when we got in touch with you last night you stated that you had to have a subpoena served on you in Corvallis before you could come?

A. That is right.

Q. So that the United States Marshal went down this morning and brought you back with him today?

A. That is correct.

Mr. Kester: Thank you.

Cross-Examination

By Mr. Kerr:

Q. Mr. Bullis, how many lots did you say you made these tests on in 1947?

A. That is, commercial lots that are used for the average?

Q. Yes. A. Twenty-nine samples.

Q. Where did you get those samples?

A. Most of those samples were brought to the

(Testimony of D. E. Bullis.)

laboratory by Mr. Jack Sather, who was then a member of the Farm Crops Department, and they represented commercial samples in which he was interested and which he had collected.

Q. Were those samples that he was interested in because of mildew damage?

A. I don't know. I don't know what his interest in them was.

Q. Do you know whether or not the purpose of the investigation or the chemical analysis was to determine the effect of mildew damage upon the hops? A. No, I don't know that. [269]

Q. Do you know whether or not these samples were of mildew-damaged hops?

A. No, I have no definite knowledge of that, either.

Q. Do you know the extent of the mildew damage in each of the 29 lots you referred to? A. No.

Q. Now, referring to your letter of September 26th, I believe, which you testified from or concerning which you testified——

Mr. Kerr: And I might say to the Court that we have not seen anything except the one letter which he referred to, of September 26th.

Mr. Kester: They have all been marked and been in evidence here for several days, and he saw them at the time of the deposition weeks ago.

Mr. Kerr: Is that what he was referring to, the material that was in evidence?

Mr. Kester: Yes.

(Testimony of D. E. Bullis.)

Mr. Kerr: Very well.

Q. Now, referring to your letter of September 26th, you say Sample No. 64 is Kilian Smith's sample?

A. I had no knowledge that it was Kilian Smith's sample at the time I ran it.

Q. But the sample that is listed in that letter as Sample No. 64, that was a sample which was marked 64 when you got it; is that right? [270]

A. Yes, that is the only identification it had on it.

Q. Now, with reference to the Alpha resin, did you say that is the soft or the hard resin?

A. It is one of the soft resins.

Q. One of the soft resins. Lot or Sample No. 64 is one of how many samples covered by that report? 12; is that right?

A. This particular one, I think, there are 12 in, yes.

Q. Have you determined where, relatively, in numerical order Lot No. 64 stands on your determination of Alpha resin content?

A. In that particular series of samples?

Q. Yes. A. I have not.

Q. As a matter of fact, it stands at sixth, doesn't it, the sixth in Alpha resin content, in percentage basis, sixth out of twelve?

A. That is, you mean in decreasing order or increasing order of Alpha resin content the sixth on this list?

Q. In decreasing order, the percentage of Alpha

(Testimony of D. E. Bullis.)

resin content.

A. It would appear here to be the seventh one, I think. No, in increasing order it would be sixth.

Q. Now, with relation to the Beta resins content Sample No. 64 stands seventh, does it not? It is seventh out of the twelve?

A. Yes, it is the seventh.

Q. And with respect to preservative value, which I believe you testified is of material importance so far as the brewing quality [271] is concerned, it stands No. 9 in the 12, does it not? A. Yes.

Q. Do you know whether any of the hop samples which you examined in 1947 in this manner, or tested in this manner, was a sample of prime quality hops? A. I don't know.

Q. You are not an expert on grades of hops, are you? A. Certainly not.

Q. You specified the average Alpha resins, Beta resins and preservative value content of the 12 samples we have been discussing, or the average, I guess, of the 29 samples. Which was it you referred to? For instance, the 4.61 per cent as an average of Alpha resin content, was that the average of the 29 lots that you examined? A. That is right.

Q. All right. Now, what was the maximum of those 29?

A. If I may refer to some figures here, I think I can give you that. The maximum Alpha resin content of those 29 was 5.7.

Q. 5.7? A. Yes.

(Testimony of D. E. Bullis.)

Q. Now, let's see. In the report of September 26th you show at least one of 5.76.

A. Well, I just rounded these figures up here to the first decimal place. [272]

Q. I see. And the maximum of the Beta resin—

A. 10.6.

Q. 10.6. Then the maximum in each case is included among the 12 specified in your letter of September 26th; is that right?

A. It probably is.

Q. And in preservative value what was the maximum? A. 90.7.

Q. In 1947, I mean. Did you make a similar test of 1940 crop hops in Oregon?

A. Yes. We have some figures on 1940 crop hops.

Q. Do you recall how many samples in that case, as to the 1940 crop hops, you examined?

A. I believe it was 143 samples that were included in the average test.

Q. How many? A. 143 samples.

Q. 143? A. You said the 1940 crop?

Q. 1940 crop. A. Yes, 143 samples.

Q. What was the average of the Alpha resin content of those samples?

The Court: Haven't you got that in an exhibit?

The Witness: Sir? [273]

The Court: Have you got that on paper, those 1940 figures?

A. In these files I have here, these letters which were just handed me.

(Testimony of D. E. Bullis.)

Mr. Kester: They are in evidence.

The Court: I can read all those. You can argue it. You don't need to have him read it on the stand. This has gone far enough. Put the 1940 in as an exhibit if it is not in already.

Mr. Kester: It is in.

Mr. Kerr: May I see that exhibit, please, Mr. Bailiff?

The Court: If every witness got on and read all of his letters over again, we would never get through with the case.

Q. (By Mr. Kerr): According to Exhibit 39, the average preservative value of the 1940 hops, as you determined out of 143 samples, was 109.5 per cent, was it not? A. That is right.

Q. Can you account for the difference between the preservative value of the 1940 crop of hops which you sampled and those in 1947?

A. I can't account for it. I can express my opinion.

Q. Your opinion, please.

A. Because the 1947 crop of hops as a whole were of poorer quality, I think, than the 1940 crop.

Q. By reason of what, Mr. Bullis?

A. I am expressing my opinion only on the basis of the chemical [274] analyses from the standpoint of resin content.

Q. Do you know what caused that difference in chemical content? A. I do not.

(Testimony of D. E. Bullis.)

Q. You are not a brewmaster, are you, Mr. Bullis? A. No.

Mr. Kerr: That is all. Thank you.

Redirect Examination

By Mr. Kester:

Q. One more question, Mr. Bullis. Isn't it generally considered that the total of the soft resins should be around 11 per cent for satisfactory brewing quality?

A. I couldn't answer that question. I don't know what a brewmaster considers as a satisfactory soft resin content.

Q. Isn't that common knowledge in the chemical analysis of hops?

A. Not in chemical analyses, it isn't, as far as I have read.

Q. You know, of course, Miss Lela Cushing, do you not? A. Yes.

Q. She was the chemist in charge of the Pacific Hop Growers laboratory in Salem? A. Yes.

Q. You established that laboratory for her and taught her the methods and worked with her there, did you not? A. That is correct. [275]

Q. Would it refresh your recollection any to recall the time that she testified in the case of Stenberg against Tautfest to the effect that——

Mr. Kerr: Just a moment.

The Court: Let's have the question and then you can object.

Q. (By Mr. Kester): Would it refresh your

(Testimony of D. E. Bullis.)

recollection to recall the occasion when she testified in the case of Stenberg vs. Tautfest at Salem that around 11 per cent was required for a satisfactory brewing analysis? A. No——

Mr. Kerr: We object to the question upon the ground——

The Court: Sustained. You say you don't know?

A. That is right.

Mr. Kester: All right. That is all.

Mr. Kerr: That is all.

(Witness excused.)

Mr. Kester: The Plaintiff is ready to rest, if the Court please, with the reservation that if there are any amendments to be made later they can be worked out.

Mr. Kerr: If the Court please, we would like at this time for the record to show our objections to certain exhibits which have been tendered subject to possible later objection by Counsel during the course of the trial. [276]

The Court: You can state that at the recess.

Mr. Kerr: Yes, sir. [277]

[Title of District Court and Cause.]

Reporters' Certificate

We, Ira G. Holcomb and John S. Beckwith, Official Reporters of the above-entitled Court, do hereby certify that on January 27 and 28, 1949, we reported in shorthand certain proceedings occurring upon the trial of the above-entitled matter, that we there-

after caused our respective shorthand notes to be reduced to typewriting under our direction, and that the foregoing transcript, consisting of Pages numbered 1 to, both inclusive, constitutes a full, true and accurate transcript of said proceedings so taken by us in shorthand on said dates, as aforesaid, and of the whole thereof.

Dated this 3rd day of November, A.D. 1949.

/s/ IRA G. HOLCOMB,

Official Reporter.

/s/ JOHN S. BECKWITH,

Official Reporter.

[Endorsed]: Filed December 28, 1949.

CLERK'S CERTIFICATE

United States of America,

District of Oregon—ss:

I, Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of transcript on removal from Marion County, Oregon, Motion to dismiss, Order reserving decision on motion, Amended answer, Memorandum decision, Reply to counterclaim, Findings of fact and conclusions of law, Judgment, Notice of appeal, Supersedeas bond, Order extending time to file appeal, Statement of points, Designation, Order to send exhibits, Appellee's designation, Order extending time to file appeal, Transcript of docket entries, con-

stitute the record on appeal from a judgment of the said court in a cause therein numbered Civil 4083, in which Hugo V. Loewi, Inc., a corporation is defendant and Appellant, and Kilian W. Smith is plaintiff and Appellee; that the record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant and the designation filed by the appellee, and in accordance with the rules of this court.

I further certify that there is enclosed herewith duplicate transcript of proceedings of January 27 and 28, 1949, filed in this office in this cause, together with exhibits 1, 2, 3 to 32 inc., 33-A, 33-B, 33-C, 34, 36 to 45 inc., 45-A, 46 to 51 inc.

I further certify the filing fee of \$5.00 has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 17th day of December, 1949.

LOWELL MUNDORFF,

Clerk.

[Seal] By /s/ F. L. BUCK,

Chief Deputy.

[Endorsed]: No. 12441. United States Court of Appeals for the Ninth Circuit. Hugo V. Loewi, Inc., a corporation, Appellant, vs. Kilian W. Smith, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: December 28, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

No. 12441

HUGO V. LOEWI, INC., a corporation,
Appellant,
vs.
KILIAN W. SMITH,
Appellee.

STIPULATION WITH RESPECT TO
PRINTING OF EXHIBITS

Whereas, there are in this cause a substantial number of documentary exhibits (including letters, telegrams, and other records) which would be very expensive to print or otherwise reproduce; and,

Whereas, the appeal involves factual issues, and

each party on brief and in argument will wish to refer to certain of said documentary exhibits;

It Is Hereby Stipulated, subject to the approval of the court, that an order may be entered on this appeal permitting all of said documentary exhibits to be considered by the court in their original form without the necessity of printing or otherwise reproducing the same.

The exhibits to which this stipulation refers have the following numbers:

(a) Plaintiff's exhibits: 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33-A, 33-B, 33-C, 34.

(b) Defendant's exhibits: 1, 2, 3, 4, 5, 6, 7, 8, 9, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 45-A, 46, 47, 48, 49, 50, 51.

Dated this 21st day of December, 1949.

/s/ STUART W. HILL,

Of Attorneys for Appellant.

/s/ WILLIAM E. DOUGHERTY,

Of Attorneys for Appellee.

So Ordered:

/s/ WILLIAM DENMAN,

Chief Judge.

/s/ WILLIAM HEALY,

/s/ HOMER BONE,

United States Circuit Judge.

[Endorsed]: Filed December 28, 1949.

[Title of Court of Appeals and Cause.]

CONCISE STATEMENT OF THE POINTS ON
WHICH APPELLANT INTENDS TO
RELY ON APPEAL.

The appellant hereby adopts the statement of points upon which it intends to rely on appeal, which was filed with the Clerk of the United States District Court for the District of Oregon. (Transcript, Document No. 12.)

Dated this 21st day of December, 1949.

KERR & HILL,
/s/ ROBERT M. KERR,
/s/ STUART W. HILL,
Attorneys for Appellant.

State of Oregon,
County of Multnomah—ss.

I hereby certify that I have prepared the foregoing copy of Concise Statement of the Points on Which Appellant Intends to Rely on Appeal and have carefully compared the same with the original thereof; and that it is a true and correct copy therefrom and of the whole thereof.

Dated December 21, 1949.

STUART W. HILL,

Of Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed December 28, 1949.

[Title of Court of Appeals and Cause.]

DESIGNATION OF THE PORTIONS OF THE
RECORD WHICH APPELLANT THINKS
NECESSARY FOR CONSIDERATION OF
POINTS TO BE RELIED UPON.

The appellant, Hugo V. Loewi, Inc., hereby designates for inclusion in the printed record on appeal the following portions of the record, proceedings, and evidence:

1. Transcript on removal from the Circuit Court of the State of Oregon for the County of Marion. (Transcript, Document No. 1) (The portion of this document other than the Complaint need not be printed unless it is required to be in the record by the practice of this court.)

2. Motion to dismiss, to strike, and for more definite statement. (Transcript, Document No. 2.)

3. Order reserving decision on motion. (Transcript, Document No. 3.)

4. Amended answer. (Transcript, Document No. 4.)

5. Reply to counterclaim. (Transcript, Document No. 6.)

6. Findings of fact and conclusions of law. (Transcript, Document No. 7.)

7. Memorandum of decision. (Transcript, Document No. 5.)

8. Judgment. (Transcript, Document No. 8.)
9. Notice of appeal. (Transcript, Document No. 9.)
10. Supersedeas bond. (Transcript, Document No. 10.)
11. Order extending time for filing record on appeal and docketing appeal, entered November 18, 1949. (Transcript, Document No. 11.)
12. Statement of points on which defendant intends to rely on appeal. (Transcript, Document No. 12.)
13. Designation of contents of record on appeal, filed with the Clerk of the United States District Court for the District of Oregon. (Transcript, Document No. 13.)
14. Complete typewritten transcript of the proceedings and testimony before the court at the trial of this case. (Transcript, Document No.)
15. Order to send original exhibits. (Transcript, Document No. 14.)
16. Order extending time to file record on appeal. (Transcript, Document No. 16.)
17. Transcript of docket entries. (Transcript, Document No. 17.)
18. Clerk's certificate of transcript. (Transcript, Document No. 18.)

19. The following exhibits:

(The following designation of exhibits is to be disregarded if an order is entered by the court pursuant to the stipulation filed contemporaneously herewith.)

(a) Plaintiff's exhibits having the following numbers: 13, 14, 16, 17, 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33-A, 33-B, 33-C, 34.

(b) Defendant's exhibits having the following numbers: 1, 2, 3, 4, 5, 6, 7, 8, 9, 36, 37, 42, 43, 44, 45, 45-A, 46, 47, 48, 49, 50, 51.

20. This designation of the portions of the record which appellant thinks necessary for consideration of points to be relied upon.

21. Stipulation with respect to printing of exhibits.

22. Order which may be entered pursuant to such stipulation.

Dated this 21st day of December, 1949.

KERR & HILL,

/s/ ROBERT M. KERR,

/s/ STUART W. HILL,

Attorneys for Appellant.

State of Oregon,

County of Multnomah—ss.

I hereby certify that I have prepared the foregoing copy of Designation of the Portions of the

Record which Appellant Thinks Necessary for Consideration of Points to be Relied Upon, and have carefully compared the same with the original thereof; and that it is a true and correct copy therefrom and of the whole thereof.

Dated December 21, 1949.

STUART W. HILL,

Of Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed December 28, 1949.

[Title of Court of Appeals and Cause.]

APPELLEE'S DESIGNATION OF ADDITIONAL PARTS OF THE RECORD CONSIDERED MATERIAL ON THE APPEAL

The appellee, Kilian W. Smith, having been served with appellant's designation of certain portions of the record, hereby designates the following additional parts of the record which appellee thinks material to the consideration of the appeal:

1. Appellee's designation of additional contents of record on appeal. (Transcript, Document No. 15.)

2. Plaintiff's Exhibits 10, 11, 12, 15, 18 and 23; and Defendant's Exhibits 38, 39, 40 and 41. (The

printing of exhibits is subject, however, to such order as the Court may enter in connection with the stipulation, heretofore filed, relating to the consideration of the exhibits in their original form.)

3. The proceedings and evidence (including the transcript of testimony and the exhibits) contained in the records now before this Court on appeal from the judgments of the United States District Court for the District of Oregon in the cases of

Hugo V. Loewi, Inc., Appellant, vs. Fred Geschwill, Appellee, No. 12440, and

John I. Haas, Inc., Appellant, vs. O. L. Wellman, Appellee, No. 12442,

which two civil actions were tried in the District Court jointly with this action. (The printing in this case of the records in those cases is subject, however, to such order as the Court may enter with respect to appellee's motion referred to in the next paragraph below.)

4. Appellee's motion for consolidation of the record in this case with the records on appeal in the two cases named in the preceding paragraph, which motion is filed contemporaneously herewith.

5. Such order as the Court may enter with respect to appellee's motion referred to in paragraph 4 above.

6. This designation of additional parts of the record considered material on appeal.

Dated this 30th day of December, 1949.

/s/ ROY F. SHIELDS,
/s/ RANDALL B. KESTER,
/s/ WILLIAM E. DOUGHERTY,
MAGUIRE, SHIELDS,
MORRISON & BAILEY,
Attorneys for Appellee.

Receipt of copy acknowledged.

[Endorsed]: Filed January 3, 1950.

[Title of Court of Appeals and Cause.]

MOTION FOR CONSOLIDATION OF RECORDS

Now comes the appellee, Kilian W. Smith, and moves the Court to consolidate, for the purposes of this appeal, the record in this case with the records now before the Court in the contemporaneously appealed cases of

Hugo V. Loewi, Inc., Appellant, vs. Fred Geschwell, Appellee, No. 12440, and

John I. Haas, Inc., Appellant, vs. O. L. Wellman, Appellee, No. 12422,

to the extent that (a) the evidence, exhibits and proceedings contained in the records on appeal in said other two cases may be considered as a part

of the record in this case, and (b) any part of the evidence, exhibits or proceedings which may be printed in said other two cases may be considered in this case without the necessity of printing the same again for this case.

In support of the foregoing motion the appellee respectfully shows the Court:

1. All three cases are civil actions which involve common questions of law and fact.

2. The three cases were tried jointly in the District Court. There is one combined record for all three cases to this extent: The parties consented and the District Court ordered that the evidence in any of the three actions should be deemed to have been taken and heard and should be considered in each of the actions so tried together in so far as such evidence was pertinent, material and relevant.

3. Appellant's designations of record in the three cases undertook to divide such combined record into three distinct and separate parts. By appellee's cross-designations the part of the combined record below contained in each of the records on appeal has been included in the record on appeal in the other cases. It would, however, be very expensive, and we think unnecessary, to print again in this case the portions of the combined record which will be printed and will be before the Court in said other two cases.

4. Appellant's statement filed herein indicates that twenty-two of the fifty-four points upon which appellant intends to rely (being Points 1 through 22) relate to the District Court's findings of fact. In order to meet appellant's contentions on such factual issues in this case it will be necessary for appellee to refer in part to evidence which is material and relevant to this case, and which appears in the combined record, but which under appellant's designation would be printed or otherwise available for consideration only by reference to the record in another of said cases.

5. Appellant's statement filed herein indicates that eight of the points upon which appellant intends to rely (being Points 47 through 54) relate to asserted errors in admitting evidence during the trial in the above-mentioned case of *Hugo V. Loewi, Inc., Appellant vs. Fred Geschwill, Appellee*. In order to permit consideration of such issues, appellee deems it necessary to have the record in that case before the Court in this case.

6. The Federal Rules of Civil Procedure, whenever applicable, have been adopted as part of the Rules of this Court with respect to appeals in actions, such as these, of a civil nature. Rule 42 (a) of the Federal Rules of Civil Procedure provides:

“(a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may

order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.”

It is submitted that the foregoing rule is applicable here, and that the granting of appellee’s motion together with the like motions filed in said other two cases would, within the intent and purpose of that rule, facilitate the Court’s consideration of each of the three cases, and also avoid unnecessary costs.

The foregoing statements of fact are based upon the records before the Court, and are also verified by the affidavit appended hereto.

Subject to the approval of the Court, the appellee submits the foregoing motion without oral argument, unless a hearing be requested by the appellant.

Respectfully submitted,

/s/ ROY F. SHIELDS,

/s/ RANDALL B. KESTER,

/s/ WILLIAM E. DOUGHERTY,

MAGUIRE, SHIELDS,

MORRISON & BAILEY,

Attorneys for Appellee.

So Ordered:

/s/ WILLIAM DENMAN,

Chief Judge.

/s/ WILLIAM HEALY,

/s/ HOMER BONE,

U. S. Circuit Judges.

AFFIDAVIT

State of Oregon,
County of Multnomah—ss.

I, William E. Dougherty, being first duly sworn, do depose and say that I am one of the attorneys of record for appellee in the within-entitled case, that I have knowledge of the facts, and that the statements made in support of the foregoing motion are true as I verily believe.

/s/ WILLIAM E. DOUGHERTY.

Subscribed and sworn to before me this 30th day of December, 1949.

[Seal] /s/ MARION HUGGINS,
Notary Public for Oregon.

My commission expires: March 13, 1951.

Receipt of copy acknowledged.

[Endorsed]: Filed January 4, 1950.

[Title of Court of Appeals and Cause.]

ANSWER TO MOTION FOR CONSOLIDATION
OF RECORDS

Now comes the appellant, Hugo V. Loewi, Inc., a corporation, and files this Answer to the Motion for Consolidation of Records heretofore filed on behalf of the appellee. We consent on behalf of the

appellant that the evidence, exhibits and proceedings contained in the records on appeal in said other two cases may be considered as a part of the record in this case, so far as pertinent, and that any part of the evidence, exhibits, or proceedings which may be printed in said other two cases may be considered in this case without the necessity of printing the same again for this case, so far as pertinent.

In support of this Answer, we rely upon the portion of the Transcript of Proceedings in the case of Hugo V. Loewi, Inc., a Corporation, Appellant, v. Gred Geschwill, Appellee, a portion of which is set forth in the Answer to Motion for Consolidation of Records filed in that case contemporaneously herewith.

Respectfully submitted,

KERR & HILL,

/s/ ROBERT M. KERR,

/s/ STUART W. HILL,

Attorneys for Appellant.

State of Oregon,

County of Multnomah—ss.

I, Stuart W. Hill, being first duly sworn, depose and say that I am one of the attorneys of record for appellant in the within-entitled case, that I have knowledge of the facts, and that the statements

made in support of the foregoing Answer are true as I verily believe.

/s/ STUART W. HILL.

Subscribed and sworn to before me this 7th day of January, 1950.

[Seal] /s/ GERALDINE RIST,
Notary Public for Oregon.

My Commission Expires May 22, 1953.

State of Oregon,
County of Multnomah—ss.

I hereby certify that I have prepared the foregoing copy of Answer to Motion for Consolidation of Records and have carefully compared the same with the original thereof; and that it is a true and correct copy therefrom and of the whole thereof.

Dated January 7, 1950.

STUART W. HILL,
Of Attorneys for Appellant.

State of Oregon,
County of Multnomah—ss.

I, Geraldine Rist, being first duly sworn, depose and say: On January 7, 1950, I mailed a copy of this Answer to Motion for Consolidation of Records to Maguire, Shields, Morrison & Bailey, Attorneys for the Appellee, by depositing the same in the United States mail, correctly addressed to their

office in the Pittock Block, Portland, Oregon, first
class postage fully prepaid.

/s/ GERALDINE RIST.

Subscribed and sworn to before me this 7th day
of January, 1950.

[Seal] /s/ STUART W. HILL,
Notary Public for Oregon.

My Commission Expires Feb. 27, 1953.

[Endorsed]: Filed January 9, 1950.

